

*Not So Fast, China**Washington*

China's unique economic situation, it is important to understand the role it plays in the WTO.<sup>18</sup>

There are many reasons for the lack of consideration given to China's status at the time the WTO agreements were written. First, many of the innovative forms that make up China's economy were not implemented until many years after the agreement was written. Second, China was not party to the agreements at the time they were written, so it did not have an opportunity to influence the development of the rules.

It was not until December 2001 that China joined the WTO by way of a thoroughly negotiated protocol.<sup>19</sup> The protocol incorporated many China-specific provisions that are not applicable to other countries in the WTO. One such provision is Article 15(a)(ii), which states: "The importing WTO Member *may use a methodology that is not based on a strict comparison with domestic prices* or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."<sup>20</sup> All authorities agree that this provision gives WTO members legal authority to employ the "surrogate country" method in antidumping investigations against China.<sup>21</sup> However, this provision was given a time limit. Article 15(d) states that "the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession."<sup>22</sup> December 11, 2016 marked fifteen years since the accession, so that provision, (a)(ii) is now expired.

Following the expiration of Article 15(a)(ii), China and many other WTO countries believe that the alternative "surrogate country" method is no longer available to investigating authorities.<sup>23</sup> Experts are split as to whether this

<sup>18</sup> The State is a corporate holder in all the largest companies. The Communist Party plays a role in choosing who will be the heads of companies. In exchange for bailouts the government demands shares in companies etc. *Id.* at 270–74.

<sup>19</sup> WTO, Ministerial Declaration of 23 November 2001, Accession Protocol of the People's Republic of China, WTO Doc. WT/L/432, [hereinafter *Accession Protocol*].

<sup>20</sup> *Id.* at art. 15(a)(ii) (emphasis added).

<sup>21</sup> Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶287, WTO Doc. WT/DS397/AB/R (adopted July 15, 2011) [hereinafter *EC-Fasteners 2011*] ("paragraph 15(a) of China's Accession Protocol *permits importing Members to derogate from a strict comparison with domestic prices* or costs in China, that is, in respect of the determination of the normal value.") (emphasis added).

<sup>22</sup> Accession Protocol, *supra* note 19, at art. 15(d), .

<sup>23</sup> U. S. Dep't of Com., Memorandum on China's Status as a Non-Market Economy Country, 1, 9, A-570-053, (Oct. 26, 2017) [hereinafter *DOC Memo*] ("MOFCOM [Ministry of Commerce, People's Republic of China] urges the United States to comply with the expiration of Section 15(a)(ii) of China's Accession Protocol and explains that it would not submit comments in response to the notice of inquiry with respect to the criteria set forth in Section 771(18) of the Act because any determinations with respect to the criteria laid out in the Act would have no bearing on the United

conclusion is inevitable.<sup>24</sup> Nonetheless, because the E.U. and the U.S. do not believe that China's current market situation produces reliable domestic prices that can be compared to export prices, they are committed to subjecting Chinese imports to greater scrutiny under the "analogue country" method.<sup>25</sup>

The E.U. has demonstrated this commitment by passing a new law providing for the employment of alternative methods in cases of substantial distortion.<sup>26</sup> The U.S. has demonstrated this commitment by continuing to launch anti-dumping investigations against China<sup>27</sup> and releasing a new memo regarding China's Non-Market Economy (NME) status.<sup>28</sup> Undeterred by the Western powers' muscle-flex, China is committed to forcing WTO Members to accept its interpretation of the protocol. It has demonstrated this position by ignoring calls by the U.S. to contribute to its NME investigation,<sup>29</sup> and filing claims against both the E.U. and

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States' compliance with the General Agreement on Tariffs and Trade (GATT) and the Agreement on implementation of Article VI of the GATT ("Antidumping Agreement"). It also argues that the United States is obligated to no longer use a surrogate methodology with respect to all antidumping determinations targeting Chinese products after December 11, 2016." (emphasis added). See also, Zhang Xiangchen, Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the Dispute: European Union—Measures Related to Price Comparison Methodologies, DS516 (Geneva, Dec. 6, 2017) [hereinafter *Zhang Xiangchen statement*].

<sup>24</sup> For a review of those who believe that the expiration of section 15(a)(ii) requires China to be treated as a market economy automatically, see Matthew Nicely, *Time to Eliminate Outdated Non-market Economy Methodologies*, 9 GLOB. TRADE & CUSTOMS J. 160 (2014); Rao Wenjia, *China's Market Economy Status Under WTO Antidumping Law After 2016*, 5 TSINGHUA CHINA L. REV. 151, 156 (2013). For a review of those that do not believe that China is entitled to automatic MES see Brian Gatta, *Between 'Automatic Market Economy Status' and 'Status Quo'*, 9 GLOB. TRADE & CUSTOMS J. 165 (2014); Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9 GLOB. TRADE & CUSTOMS J. 94 (2014); Bernard O'Connor, *Market Economy Status for China Is Not Automatic*, VOX E.U. (Nov. 27, 2011), <https://perma.cc/7LRX-Q5WG>; Chad P. Bown & Petros C. Mavroidis, *One (Firm) Is Not Enough: A Legal-economic Analysis of EC-fasteners*, 12 WORLD TRADE REV. 243 (2013) (suggesting that the Appellate Body may have already laid down jurisprudence opening the door for WTO members to continue treating China as a NME beyond 2016).

<sup>25</sup> See U.S. Third-party Submission, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516 (Nov. 21, 2017) [hereinafter *U.S. Legal Interpretation*]; First Written Submission by the European Union, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516 (Nov. 14, 2017).

<sup>26</sup> Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidized imports from countries not members of the European Union, OJ L 176/55 (June 30, 2016).

<sup>27</sup> Press Release, U.S. Dep't of Com., "Department of Commerce Initiates Antidumping Duty Investigation Against Imports from People's Republic of China" (Oct. 19, 2017), <https://perma.cc/LZ9W-VMES>.

<sup>28</sup> DOC Memo, *supra* note 23.

<sup>29</sup> *Id.* at 9.

*Not So Fast, China**Washington*

the US before the WTO Dispute Settlement Body (DSB) for their continued use of alternative methodologies.<sup>30</sup>

This Comment takes the position that none of the parties is completely correct with respect to the WTO agreements. China believes that “the end of the ‘analogue country’ methodology under Section 15(a)(ii) was just a matter of time,” and that without it the analogue country method may not be used against it.<sup>31</sup> The U.S. stubbornly and incorrectly insists that permissive language in Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement (ADA), to disregard domestic prices in antidumping investigations, is a positive legal basis for employing the “surrogate country” method.<sup>32</sup> The language of the WTO agreements is less clear, and the proper understanding of the legal obligations are best understood as requiring a case-by-case analysis of the actual transactions that form the basis of the price to which importing producers turn when searching for normal value.

In Section II, this Comment will explain the legal framework that governs national investigating authorities while making dumping determinations. The GATT 1994 is the general governing document for international trade disputes. More precisely, Section II will discuss Article VI of the GATT, the Agreement for the Implementation of Article VI—also known as the Antidumping Agreement or the ADA—and the Second *Ad Note* to the first paragraph of Article VI. Section II will also discuss the applicable laws for making market status determinations, and the implications of those determinations.

Next, this Comment will flesh out the debate surrounding the expiration of Article 15(a)(ii) of the Chinese Accession Protocol in Section III. First, the Comment will give context to China’s Accession to the WTO and describe the relevant provisions of the protocol. Then the Comment will describe the various viewpoints concerning the implication of the expiration of article 15(a)(ii) on China’s market status and the remaining legal basis for employing the surrogate country method. The discussion will reveal that most scholars have assumed that China’s market status is inextricably linked with the ability to employ the surrogate country method.

Finally, in Section IV, this Comment will propose that, regardless of whether the expiration of article 15(a)(ii) requires granting market-economy status to China, WTO Members may continue to employ the surrogate country method against it in antidumping investigations where certain conditions are met. Those

<sup>30</sup> Request for Consultations by China, European Union—Measures Related to Price Comparison Methodologies, WTO Doc. WT/DS516/1, (Dec. 15, 2016); Request for Consultations by China, United States—Measures Related to Price Comparison Methodologies, WTO Doc. WT/DS515/1 (Dec. 12, 2016).

<sup>31</sup> Zhang Xiangchen statement, *supra* note 23.

<sup>32</sup> See generally US Legal Interpretation, *supra* note 25.

*Summer 2018*

7

conditions are the absence of prices in the ordinary course of trade at the discrete level of product sales rather than a general market situation.

## II. DETERMINATION OF DUMPING

The first step in an antidumping investigation is for the domestic producer to file a complaint with the domestic investigating authority alleging an instance of dumping.<sup>33</sup> The investigating authority then collects information on the export price of the product in question and the price of the product in the domestic market of the exporting country.<sup>34</sup> The difference between those two prices is called the margin of dumping.<sup>35</sup> If the margin of dumping is greater than zero, that is to say that the export price is less than the foreign producer's domestic price, then dumping is deemed to be taking place.<sup>36</sup> If the domestic producer can also prove injury<sup>37</sup> as a result of that dumping, then Article VI of the GATT allows the importing country to impose antidumping duties on the dumped product up to the margin of dumping amount.<sup>38</sup>

The margin of dumping is important for two reasons. First, it proves that dumping is actually taking place.<sup>39</sup> Second, the margin of dumping determines the size of the antidumping duty designed to remedy the injury.<sup>40</sup> There are several relevant provisions in the WTO Agreements that govern this process: Article VI:1 of the GATT 1994, the Second Ad Note to Article VI:1, and Article 2 of the ADA.

Since the margin of dumping is based on comparing the import price to the domestic price, it becomes important for the accuracy of the calculation that the information on prices or cost of production in the domestic market of the exporting country reasonably reflect the price for the product "in the ordinary course of trade."<sup>41</sup>

<sup>33</sup> *Summary of Antidumping and Countervailing Duty Investigation Procedures*, DRINKER BIDDLE & REATH, <https://perma.cc/U27L-Q37C> [hereinafter *Antidumping Procedures*].

<sup>34</sup> GATT, *supra* note 2, at art. VI:1.

<sup>35</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.2, Jan. 1, 1980, 1186 U.N.T.S. 814 [hereinafter *ADA*].

<sup>36</sup> GATT, *supra* note 2, at art. VI:1.

<sup>37</sup> *Antidumping Procedures*, *supra* note 33 ("Material injury is measured by such factors as lost sales, price suppression, layoffs, increasing inventories, decreasing shipments, low capacity utilization, and reduced profits (or losses).").

<sup>38</sup> GATT, *supra* note 2, at art. VI:2.

<sup>39</sup> *Id.* at art. VI:1.

<sup>40</sup> *Id.* at art. VI:2.

<sup>41</sup> *Id.* at art. VI:1.

*Not So Fast, China**Washington*

A comparable price is one that is determined by market forces independent of influence by any central planning authority.<sup>42</sup> The status labels for “market economy” (MES) and “non-market economy” (NME) countries developed to distinguish between countries whose prices are comparable, and those whose prices are not. Prices in MES countries are deemed presumptively comparable. Conversely, imports from non-market economies are not generally considered comparable. Following a preliminary discussion on the WTO Agreements, this Section will explain the various laws governing market status determinations.

#### A. The WTO Agreements

Article VI of the GATT provides for the international regulation of antidumping investigative procedures. Paragraph 1 states:

[A] product is to be considered as being [dumped] . . . if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, (b) in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.<sup>43</sup>

There are three accepted procedures for determining when dumping is occurring. The dominant method is to compare the import price to the domestic price for the like product in the exporting country. Article VI also proposes two alternative methods. Those methods are employed only when the dominant method is unworkable due to “the absence of [a comparable] domestic price.”<sup>44</sup> These two GATT-authorized alternatives are: (1) comparing the export price to the price for the like product when exported to a third country, or (2) comparing the import price to the cost of production for the product in the exporting country.

Article VI GATT 1994 is supplemented by an interpretive note, referred to as the Second *Ad Note*. The Second *Ad Note* is a binding part of the agreement between WTO Members. It provides that a strict comparison between the import price and the domestic price in the exporting country “may not always be appropriate” due to state-sponsored distortions on the economy.<sup>45</sup> Specifically, the Second *Ad Note* states:

<sup>42</sup> *Id.* (“Comparable price, in the ordinary course of trade”).

<sup>43</sup> *Id.*

<sup>44</sup> See *id.*

<sup>45</sup> GATT, *supra* note 2, at *Second Addendum Note*, art. VI:1.

*Chicago Journal of International Law*

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.<sup>46</sup>

The Antidumping Agreement gives further details on the implementation of Article VI for the Contracting Parties. The two agreements together must be interpreted coherently such that each provision is given relevant meaning.<sup>47</sup> Article 2 of the ADA is almost a direct restatement of the provision in Article VI:1. It says:

[A] product is to be considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country” or dumping shall be determined by comparison with “a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.”<sup>48</sup>

The ADA provides the same three procedures for determining dumping. The dominant procedure is still the comparison between the import price and the domestic price in the exporting country. The condition for employing the other two alternatives is again the absence of domestic prices. However the ADA adds an additional circumstance in which a WTO Member can access the two enumerated alternatives: a “particular market situation” that would make a comparison improper.

#### B. The Legal Definition of a Market Economy is Unsettled.

The idea of a market economy is as varied as the number of countries that exist in the world. Each country has its own definition, and the WTO has no

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<sup>46</sup> *Id.*

<sup>47</sup> See Appellate Body Report, *US—Measures Relating to Shrimp from Thailand*, ¶ 233, WTO Doc. WT/343/AB/R (adopted July 16, 2008) (“Article VI of the GATT 1994 (including the *Ad Note*) and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines.”).

<sup>48</sup> ADA, *supra* note 35, at art. 2.1–2.

*Not So Fast, China**Washington*

definition at all.<sup>49</sup> Some countries—like the U.S. and the E.U.—employ multi-factor tests, while others—like Australia—allow their definitions to be molded by politics.<sup>50</sup> This wide-ranging variation becomes most obvious when China’s economic situation is taken into consideration. This Subsection will first explore the multi-factor legal tests employed by the U.S. and Europe. These tests will lead to the conclusion that China is not a market-economy country. Next this Subsection will show how some countries that have legal tests for determining market-economy status ignore them when under economic pressure to trade with China.<sup>51</sup> This Subsection will then highlight the WTO’s lack of a market-economy definition and conclude that if the Second *Ad Note* should be considered some form of an NME definition, then by adverse inference China is a market economy under WTO law. This Subsection concludes that market economy status is an unreliable term to use as a proxy not only for a country’s actual economic situation, but also for determining the circumstances under which a sale took place within that market.

### 1. Countries Employing Legal Tests

The U.S. is one of the countries that has a legal test for market economy status that it employs regularly. Its definition focuses on the factors that it considers to render an economy an NME. In § 1677(18)(A) of the U.S. Tariff Act of 1930, the U.S. defines a non-market economy as any foreign country that “does not operate on market principles of cost and pricing structures, so that sales of merchandise in such country do[es] not reflect the fair value of the merchandise.”<sup>52</sup> Under § 1677(18)(B), a U.S. investigating authority must consider: (1) the convertibility of currency, (2) whether wages are determined through “free bargaining,” (3) the extent to which foreign companies are permitted to invest, (4) the extent of government control over the means of production, (5) the extent of government control over resource allocation, prices, and output decisions of enterprises, and (6) other factors it considers appropriate.<sup>53</sup>

The U.S. regime for the determination of NME creates a balancing test where each factor is on a sliding scale. A conclusion about a country’s economic status cannot be certain without extensive analysis of all the factors. Under U.S.

<sup>49</sup> Garrett E. Lynam, Note, Using WTO Countervailing Duty Law to Combat Illegally Subsidized Chinese Enterprises Operating in a Nonmarket-Economy: Deciphering the Writing on the Wall, 42 CASE W. RES. J. INT’L L. 739, 750 (2010).

<sup>50</sup> Andrew L. Stoler, *Market Economy Status for China: Implications for Antidumping Protection in Australia*, Australia-China Business Council of South Australia (Sept. 28, 2004), <https://perma.cc/K21M-KN3M>.

<sup>51</sup> *Id.*

<sup>52</sup> Tariff Act of 1930, 19 U.S.C. § 1677 (18)(A) (West) [hereinafter *Tariff Act*].

<sup>53</sup> *Id.*

*Chicago Journal of International Law*

law, if a country is not designated an NME following the prescription of the Tariff Act, it is presumed to be a market economy.

In October 2017, the U.S. Department of Commerce (DOC) released a memo analyzing China's economic status under these factors. The memo concluded that China continued to exhibit the characteristics of a Non-Market economy stating: "the framework of China's economy is set by the Chinese government and the Chinese Communist Party (CCP), which exercise control directly and indirectly over the allocation of resources through instruments such as government ownership and control of key economic actors and government directives."<sup>54</sup>

Under factor one, the DOC found that, while the Chinese currency was convertible, China still intervenes to limit the extent of price divergence between onshore and offshore currency.<sup>55</sup> Under factor two, the DOC recognized the existence of variable wages, but also noticed that there were many significant constraints to free wage bargaining.<sup>56</sup> Under factor three, DOC noticed that China's foreign investment regime was particularly more restrictive relative to that of other major economies.<sup>57</sup> Under factor four, DOC found that China's role in the private sector, through "state-invested enterprises," and its system of ownership and control over land use was an indication of government control over the means of production.<sup>58</sup> Under factor five, the DOC pointed to formal planning mechanisms through the CCP and ownership of the largest electrical grid operator as a sign of "resource allocation" control.<sup>59</sup> Under factor six, the DOC found that the CCP secures discrete economic outcomes through corruption and local protectionism.<sup>60</sup>

The E.U. employs a similar multi-factor test. Article 7(c) of the E.U. Council Regulation (EC) No. 384/96 details several market features that define a market economy. These features include: (1) firm decisions on prices and outputs are made in response to market signals reflecting supply and demand, (2) firms' accounting records are independently audited in line with international accounting standards, (3) production costs are not distorted by non-market economy systems in relation to asset depreciation, write-offs, or payments via compensation of debts, (4) firms are subject to bankruptcy and property laws, (5) currency is exchanged at the market rate. Each factor being dispositive, by reasonable inference an economy that functions in the absence of one of them is not a market

<sup>54</sup> DOC Memo, *supra* note 23, at 4.

<sup>55</sup> *Id.* at 19.

<sup>56</sup> *Id.* at 20.

<sup>57</sup> *Id.* at 32.

<sup>58</sup> *Id.* at 52.

<sup>59</sup> *Id.* at 117.

<sup>60</sup> *Id.* at 181, 187, 192-194.

*Not So Fast, China**Washington*

economy.<sup>61</sup> Considering that the U.S. and the E.U. share a commitment to treating China as an NME, it is unlikely that an assessment under the E.U. test would lead to a different conclusion. In fact, the *EC—Fasteners*<sup>62</sup> case is an example of China failing to meet the standards outlined by the E.U. In *EC—Fasteners*, the E.U. employed its market economy test against China in order to determine whether certain other European antidumping regulations (unrelated to dumping margin) may be applicable to China. For reasons unrelated to the topic of this Comment, the WTO Appellate Body did not allow the use of the E.U.’s test because it was not limited to the specific situation of finding comparable prices in the domestic market.<sup>63</sup>

Australia is another country that employs legal tests for the determination of MES. However, under pressure to trade with China, Australia disregarded its own law and granted China MES. For Australia, the choice was straightforward. China is Australia’s largest export market.<sup>64</sup> While negotiating its free trade agreement with China, China insisted on MES as a condition of concluding the agreement.<sup>65</sup> On balance, Australia’s governments seems to have concluded that granting China MES was a small price to pay given the benefit to their domestic producers of having China’s market open to it.

## 2. The WTO Does Not Grant MES.<sup>66</sup>

In contrast to the fact-specific inquiry required under U.S. and E.U. law, the generally accepted definition of NME under WTO law is, “a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State.”<sup>67</sup> While this simple definition, provided in the Second *Ad Note* of Article VI of the GATT, does not use the term non-market economy, it has become the generally accepted definition because it is referenced as such by later authorities. These authorities will be discussed in this Subsection.

The first of these references takes place in the addendum to Article 15 of the Tokyo Round Subsidies Code. The Code merely makes reference to “a country

<sup>61</sup> Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ L 343/51, art. 2(A)(7)(c) (Dec. 22, 2016).

<sup>62</sup> *EC-Fasteners* 2011, *supra* note 21.

<sup>63</sup> *Id.*

<sup>64</sup> Australia’s Trade Statistics at a Glance, AUSTRALIAN GOV’T: DEP’T OF FOREIGN AFF. AND TRADE, April, 27, 2018 <https://perma.cc/XUD7-XS3F>.

<sup>65</sup> *See Stoler, supra* note 50, at 2.

<sup>66</sup> Lynam, *supra* note 49, at 750.

<sup>67</sup> GATT, *supra* note 2, at *Second Addendum Note*, art. VI:1.

described in [the addendum] to Article VI.”<sup>68</sup> The substance of this reference takes on meaningful form much later in the *United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China*<sup>69</sup> case. In that case, the panel said that the Tokyo Round Subsidies Code “explicitly addressed the [ ] use of NME methodologies . . . in respect of imports from NMEs.”<sup>70</sup> By referencing the Tokyo Round Subsidies Code and stating that it “explicitly addresses” NMEs, the panel of the WTO adopted the description, provided in the Second *Ad Note* to paragraph 1 of Article VI of the GATT and which the Tokyo Round Code references, as a definition of an NME.

There is reason to believe, however, that the Second *Ad Note* definition is not the exclusive definition of an NME under the WTO. In *EC—Fasteners*, the Appellate Body states that “[t]he second *Ad Note* to Article VI:1 would thus not on its face be applicable to *lesser forms of NMEs* that do not fulfil [sic] both conditions.”<sup>71</sup> By stating “lesser forms” the appellate body is acknowledging that there are other forms of NMEs that are not captured within the definition provided in that addendum. The appellate body does not, however, provide a definition of a lesser-form NME.

It is clear from the discussion so far that there exists the idea of a distinction between market-economies and non-market economies. It is also clear that the various authorities are in disagreement about where to draw the line for that distinction. The U.S. and E.U. have developed in-depth, fact-based legal tests for their domestic investigating authorities to use when assessing a country’s economic status. On the other hand, the WTO has provided a clear rule that would be difficult for any country to satisfy, while also leaving undefined the parameters of “lesser form NMEs.”

Depending on where the line is drawn, China may or may not be considered a market economy. Vis-à-vis the U.S. and E.U., it is an NME. Under the limited definition provided by the WTO, it is not an NME. Left uncertain is whether China would be considered a lesser-form NME under the WTO, and if so what the legal implications would be of being a lesser-form NME.

### C. The Legal Implications of Non-Market Economy Status

<sup>68</sup> Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, art. 15:1, WTO Doc. LT/TR/A/3 (Apr. 12, 1979).

<sup>69</sup> United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China, WTO Doc. WT/DS/379 <https://perma.cc/N6F9-S4U7>.

<sup>70</sup> Panel Report, United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China, ¶ 14.119, WTO Doc. WT/DS379/R (adopted Oct. 22, 2010).

<sup>71</sup> *EC—Fasteners* 2011, *supra* note 21, at ¶ 285 n. 460 (emphasis added).

*Not So Fast, China**Washington*

When a country is deemed to be a non-market economy pursuant to the factors outlined in the 1930 Tariff Act, the U.S. concludes that the country “does not operate sufficiently on market principles to permit the use of [its] prices and costs for purposes of the Department’s [DOC’s] antidumping analysis.”<sup>72</sup> As a result, the U.S. government allows antidumping investigating authorities to employ alternative normal value calculation methods rather than relying on the exporting country’s domestic market prices. The NME determination remains in effect until revoked by the Department of Commerce.<sup>73</sup>

The E.U. draws the same conclusion when it, according to its law, gives a country NME status. The NME status “allows the European Commission to apply a different methodology to calculate antidumping margins for these countries.”<sup>74</sup> In these cases, the E.U. most frequently “relies on a surrogate country for the calculation of the normal value.”<sup>75</sup> This approach is justified because the E.U. believes that in an NME, “domestic prices are considered unreliable.”<sup>76</sup>

Under the U.S. and E.U. regimes, the NME status functions as a gateway to employing alternative normal value calculation methodologies during antidumping investigations. Under Section 1677 18(B)(iv) of the U.S. Tariff Act of 1930,<sup>77</sup> normal value in antidumping investigations involving products from NME countries is determined on the basis of factors of production in countries that the DOC has designated as market economies. NME status does not seem to have any other legal function under U.S. law.<sup>78</sup>

Under the WTO regime, the implication of NME status is unclear because the complete definition of NME is unsettled. All that can be said with certainty is that in the case of countries that meet the requirements of the Second *Ad Note* of Article VI of the GATT, “special difficulties may exist . . . for the purposes of [calculating the normal value of imports], and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.”<sup>79</sup> The U.S. believes that by deeming strict comparisons

<sup>72</sup> DOC Memo, *supra* note 23, at 195.

<sup>73</sup> Tariff Act, *supra* note 52, at § 1677(18)(C)(i).

<sup>74</sup> Laura Puccio, Calculation of Dumping Margins: E.U. and US Rules and Practices in Light of the Debate on China’s Market Economy Status, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, PE 583.794 § 2.1 (May 2016).

<sup>75</sup> *Id.* at 1.

<sup>76</sup> *Id.*

<sup>77</sup> Tariff Act, *supra* note 52, at § 1677 18(B)(iv).

<sup>78</sup> Vera Thorstensen et al., *WTO–Market and Non-Market Economies: The Hybrid Case of China*, 1 LATIN AM. J. OF INT’L TRADE L. 765, 778 (2013).

<sup>79</sup> GATT, *supra* note 2, at *Second Addendum Note*, art. VI:1.

inappropriate in this situation, the GATT is permitting the use of alternative methodologies.<sup>80</sup> So, at the very least, this narrow definition of NME serves as a gateway to alternative normal value calculation methodologies. Left unsettled is whether such methods may be used against “lesser form NMEs” as well.

### III. DEBATE OVER CHINA’S STATUS AS A NON-MARKET ECONOMY

The debate over China’s status as a non-market economy is not a new one. Decades ago, when China first attempted to join the international rule-based trade organization then organized under the name GATT, contracting parties fiercely debated how China’s status could be accommodated by the system without undermining the goals of that same system. Even after the accession of China to the WTO in 2001, WTO Members were still skeptical of Chinese economic policies and made sure that their skepticism would be captured in the Protocol. Nonetheless, since acceding to the WTO, China has continued to make changes to its economy that WTO Members could not predict, and those changes, in conjunction with the expiration of a key provision of the Protocol, give rise to the present debate.

This Section will start by describing the political background surrounding China’s accession negotiations. Next, this Section will discuss the relevant text of the accession protocol giving rise to the current debate, followed by a discussion of how those provisions have factored into WTO disputes prior to their expiration. The last Subsection will detail the various policy considerations that influence scholars interpreting the implications of the expiration of Article 15 (a)(ii) and the lay-out the various positions taken in this debate.

#### A. The Political Backdrop to China’s Accession

China first requested to join the predecessor to the WTO in 1986, and the GATT Council established the Working Party on China’s Status as a “Contracting Party.”<sup>81</sup> China stated as its objective the establishment of a “socialist market economy” through “economic reform,”<sup>82</sup> and members of the WTO welcomed China’s accession, believing that it would strengthen the system and ensure the “steady development of the world economy.”<sup>83</sup> During negotiations, China praised itself for the developments it made to improve the macroeconomic

<sup>80</sup> U.S. Legal Interpretation, *supra* note 25.

<sup>81</sup> Working Party on the Accession of China, Report of the Working Party on the Accession of China, ¶ 1, WTO Doc. WT/ACC/CHN/49 (Oct. 1, 2001) [hereinafter *China Working Party Report*].

<sup>82</sup> *Id.* at ¶ 4.

<sup>83</sup> *Id.* at ¶ 5.

*Not So Fast, China**Washington*

regulatory system with “indirect” measures rather than direct measures.<sup>84</sup> Yet, despite all of its achievements to increase production and the per capita income of its citizens, China insisted that it was still developing and should receive the more favorable treatment reserved for developing country members.<sup>85</sup> While the members of the Working Party agreed, they were apprehensive and believed that the sheer size of China’s economy and the rapid nature of its growth called for a “tailored” approach “to fit the specific cases of China’s accession in a few areas.”<sup>86</sup>

With respect to China’s pricing policies, some members were concerned about the pricing controls utilized by the government through various central agencies. They took special care to convey to China that it should allow market forces to determine prices in every sector of the market of traded goods, and that if controls were to remain, they should conform to the requirements of Article III of the GATT and Annex 2.<sup>87</sup> These members were further concerned about the coercive effects of “guidance pricing.” Guidance pricing occurs when the government recommends certain product prices but allows industry actors to price their products within a limited percentage range of the price set by the government, usually 5 to 15 percent.<sup>88</sup> So, to these members, “guidance pricing” usurps the market just as much as the price control mechanism and should be eliminated.<sup>89</sup> In response, China explained that its pricing policies took into account normal costs of production and profits and assured the Working Party that price controls “would not be used for purposes of affording protection to domestic industries or service providers.”<sup>90</sup> Nonetheless, some Members remained worried that China could use its system of price controls as a way to limit imports.<sup>91</sup>

With respect to China’s trading policies, the Working Party was concerned about how China restricted access to the international market. At the time of negotiations, the right to import and export products from China was limited to a small number of Chinese enterprises.<sup>92</sup> Foreign-invested enterprises could also trade, but their rights were limited to importation for production purposes, and exportation within the scope of business.<sup>93</sup> Such restrictions were considered to

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<sup>84</sup> *Id.* at ¶ 6.

<sup>85</sup> *Id.* at ¶ 8. For example, developing countries can, under certain circumstances, receive favorable tariff treatment from developed countries while still maintaining high tariffs on their imports.

<sup>86</sup> *Id.* at ¶ 9.

<sup>87</sup> *Id.* at ¶ 50.

<sup>88</sup> *Id.* at ¶ 54.

<sup>89</sup> *Id.* at ¶ 51.

<sup>90</sup> *Id.* at ¶ 62.

<sup>91</sup> *Id.* at ¶ 63.

<sup>92</sup> *Id.* at ¶ 80.

<sup>93</sup> *Id.* at ¶ 80.

*Chicago Journal of International Law*

be inconsistent with WTO requirements. Members were especially concerned about the link China required between an enterprise's trade and its scope of business.<sup>94</sup> Members asked China to commit to allow all foreign companies, whether or not they were invested or registered in China, to trade within three years of accession.<sup>95</sup>

Members of the Working Party for the Accession of China also took special care to note the "special difficulties . . . in determining cost and price comparability in the context of anti-dumping investigations" against China.<sup>96</sup> While these members recognized and applauded China for "continuing the process of transition towards a full market economy," they emphasized that because China had not yet reached "full market economy" status, countries that import Chinese goods "might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate."<sup>97</sup>

China recognized the difficulties expressed by the Working Party Members with respect to antidumping investigations. In response, China made the concessions present in the protocol, which allows countries to give it NME status essentially automatically,<sup>98</sup> but China insisted that Chinese companies should be given a full and fair opportunity to present evidence and defend their interests.<sup>99</sup> As a result, WTO members made the following commitments: (1) to publish in advance (a) their domestic requirements for market economy conditions and (b) methodologies that they would use to determine price comparability; (2) to notify the Committee on Anti-Dumping Practices of its market-economy criteria and methodology; (3) ensure a transparent process that allows an opportunity for Chinese producers to comment on the applicability of the alternative methodology in particular cases; (4) provide an opportunity to present evidence in each case; (5) provide full opportunity for defense in each case; and (6) provide detailed reasoning for its determinations in each case.<sup>100</sup>

Present throughout the Working Party report is a sense of very real concern about China's continued progress toward a "full market economy" during the negotiations for its accession to the WTO. Members recognized and welcomed China's potential to contribute generously to the international marketplace, but at every occasion, took special care to highlight the areas where they considered China to fall short of "full market economy" standards: pricing, licensing

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<sup>94</sup> *Id.* at ¶ 82.

<sup>95</sup> *Id.* at ¶ 82.

<sup>96</sup> *Id.* at ¶ 150.

<sup>97</sup> *Id.* at ¶ 150.

<sup>98</sup> Accession Protocol, *supra* note 19, at art.15(a)(ii).

<sup>99</sup> China Working Party Report, *supra* note 81, at ¶ 151.

<sup>100</sup> *Id.* at ¶ 151(a-f).

*Not So Fast, China**Washington*

restrictions for imports and exports, and most importantly for this Comment, antidumping investigations.

#### B. The Accession Protocol of the People's Republic of China

After more than a decade of Working Party negotiations, the final Protocol of Accession included many concessions by China to assure WTO members of China's continued progress toward "full economy status." Under Article 9, the Protocol commits China to "allow prices for traded goods and services in every sector to be determined by market forces . . . except in exceptional circumstances."<sup>101</sup> China is also committed to allowing foreign companies to import and export as freely as domestic companies under Article 11.<sup>102</sup>

To address the concerns about price comparability in antidumping investigations, the Protocol contains extensively detailed provisions under Article 15. It should first be noted that in the *chapeau*—introduction—to the Article, the Protocol states that Article VI of the GATT 1994, the Antidumping Agreement on the Implementation of Article VI, and the Subsidies and Countervailing Measures Agreement ("SCM Agreement") shall apply to investigations against China.<sup>103</sup> Article 15 then goes on to provide additional provisions that are applicable specifically to China. Article 15(a) discusses price comparability for China under Article VI of the GATT 1994. Article 15(b) discusses proceedings under the SCM Agreement for China. Article 15(c) describes the commitments that WTO Members must make with respect to providing China a full and fair opportunity to defend itself in investigations. Finally, Article 15(d) provides an "out" clause for China with respect to the special requirements of Article 15(a). It is the interplay between these two provisions—15(a) and 15(d)—that has become the source of much dispute. The text of the Article reads:

##### Article 15:

(a) "In determining price comparability under Article VI of the GATT 1994 . . . the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or . . . [an alternative methodology] based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry . . . the importing WTO Member shall use Chinese prices or costs for the industry . . .

(ii) The importing WTO Member may use . . . [alternative methodologies] *if the producers under investigation cannot clearly show that market economy conditions prevail . . .*

<sup>101</sup> Accession Protocol, *supra* note 19, at art. 9.1-2.

<sup>102</sup> *Id.* at art. 11.4.

<sup>103</sup> *Id.* at Chapeau to art. 15.

*Chicago Journal of International Law*

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of *subparagraph (a)(ii) shall expire 15 years* after the date of accession.<sup>104</sup>

Under these provisions, Chinese producers have the burden of proving whether market economy conditions prevail under the national law of the importing country. If the producers do not meet these requirements, the importing member is permitted to employ alternative normal value calculation methodologies. Conversely, if the Chinese producers do meet the burden of proof established under national law, then the importing member is required to use Chinese prices when making a price comparison to determine the margin of dumping. The most controversial of these provisions, however, is subparagraph (d), which provides for the expiration of subparagraph (a)(ii) in fifteen years—effectively December 11, 2016. Subparagraph (a)(ii) grants permission to importing WTO members to use alternative methodologies, *if the Chinese producers cannot clearly show that market conditions prevail*.

Since subparagraph (a)(ii) expired in December of 2016, China, the U.S., the E.U., and scholars worldwide have disagreed about the implications of its expiration. Before discussing that debate in detail, it is necessary to understand what legal effect the provision had before its expiration.

### C. Antidumping Investigations against China Prior to December 11, 2016

Both before and after the accession of China to the WTO, the U.S. frequently initiated antidumping investigations against China. In each case, the U.S. treated China as a non-market economy and therefore employed alternative calculation methodologies for the determination of normal value. At no point in any of the investigations did China challenge the application of NME status before the WTO dispute settlement body under Article 15 of the Accession Protocol. All of China's petitions are related to the treatment that is accorded China once it is given such status.

China challenged the simultaneous imposition of a countervailing antidumping duty in the *United States—Definitive Anti-Dumping Countervailing Duties on Certain Products from China*<sup>105</sup> case. Following an investigation by the DOC, the American investigating authority deemed China to be an NME country, and treated it as such in calculating the margin of dumping by using the prices of a

<sup>104</sup> *Id.* at art. 15(a),(d) (emphasis added).

<sup>105</sup> Request for the Establishment of a Panel by China, *United States—Definitive Anti-Dumping Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/2 (Dec. 12, 2008).

*Not So Fast, China**Washington*

third surrogate country.<sup>106</sup> In *EC—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*,<sup>107</sup> China challenged the European regulation that applied anti-dumping duties in NME countries to all producers equally and required exporting producers to prove why they should receive “individual treatment.”<sup>108</sup> China believed that it was Europe’s responsibility to prove why individual producers did not deserve Independent Treatment (“IT”), rather than the responsibility of Chinese producers to prove that they meet the requirements for IT. Nonetheless, China accepted the NME status and focused its challenges on how its producers should be treated once given that status.<sup>109</sup> China took the same approach in several other disputes before the WTO.<sup>110</sup>

Two things can be concluded from surveying these antidumping cases against China. First, a challenge as to whether NME status may be applied in a particular case against China is unprecedented. So, the expiration of the Article 15(a)(ii) of the Accession Protocol will produce an interpretive challenge because the meaning of the provision has not been developed. Second, though NME status may be undisputed, the implications of what that status means with regard to how China should be treated in antidumping investigations remains a constant source of disagreement.

#### D. Antidumping Investigations after December 11, 2016

The expiration of Article 15(a)(ii) raises several questions. The first question is whether China must now be considered a market economy for the purposes of antidumping investigations. In a recent antidumping investigation into certain aluminum foil imports from China,<sup>111</sup> the Ministry of Commerce, People’s Republic of China (MOFCOM), insisted that the “United States is obligated to no longer use a surrogate methodology” in antidumping determinations targeting Chinese products after December 11, 2016.<sup>112</sup> In that investigation, China did not substantiate its claims with legal arguments, but other scholars that agree with

<sup>106</sup> Panel Report, United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China, ¶ 2.4, WTO Doc. WT/DS379/R (adopted Oct. 22, 2010).

<sup>107</sup> See *EC-Fasteners 2011* *supra* note 21.

<sup>108</sup> Request for Consultations by China, European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, ¶¶ 1, 2(ii), WTO Doc. WT/DS397/1 (Aug. 4, 2009).

<sup>109</sup> *Id.*

<sup>110</sup> See generally, Panel Report, *European Union—Anti-Dumping Measures on Certain Footwear from China*, WTO Doc. WT/DS405/R/ (adopted Oct. 28, 2011); and Appellate Body Report, United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China, WTO Doc. WT/DS399/R/AB (adopted Sept. 5, 2011).

<sup>111</sup> See U.S. Dep’t of Com., Memorandum on Certain Aluminum Foil from the People’s Republic of China: Initiation of Less-Than-Fair-Value Investigation, Docket No. 170328324-7324-01 (Mar. 29, 2017) <https://perma.cc/T6K4-BQUN>.

<sup>112</sup> DOC Memo, *supra* note 23 at 9.

*Chicago Journal of International Law*

China have spilled much ink to support this position. Their arguments are discussed below. The other side of the debate includes not only the U.S., but also a host of scholars who believe that the expiration of Article 15(a)(ii) either has no legal effect on the ability of WTO Members to give China NME status, or that the expiration of the provision merely changes the burden of proof for proving China's NME status.<sup>113</sup> This Comment argues that the expiration will not extinguish the power to employ the surrogate country method even if China is given MES.

There are several policy considerations that animate the debate amongst scholars and practitioners of international trade law. If the expiration of Section 15(a)(ii) means that China should not be accorded MES, then the consequences for a country that refuses to grant it, like the U.S., may be severe. The U.S. might risk antagonistic retaliation that hurts U.S. exporters and investors, further complicating U.S.-China relations while only providing a marginal benefit to select U.S. industries.<sup>114</sup> On balance, withholding MES might not do much in the way of restraining injurious imports anyway.<sup>115</sup>

China is extremely disadvantaged by the "surrogate country" method because of the high number of antidumping duties initiated against it, and the unpredictable nature of the method.<sup>116</sup> Between 2004 and 2007, China reported to the U.S. DOC that in all antidumping investigations against its producers, antidumping duties were on average thirteen times higher than for other countries.<sup>117</sup> Antidumping investigations that employ the surrogate country method are unpredictable because the importing country has discretion to choose which country it will use for the price comparison with respect to each particular investigation.

<sup>113</sup> U.S. Legal Interpretation, *supra* note 25; Michael Flynn, *China: A Market Economy?*, 48 GEO. J. OF INT'L L. 297 (2016); and O'Connor, *supra* note 24.

<sup>114</sup> Gary Clyde Hufbauer, Statement on Market Economy Status, Testimony before the U.S.-China Economy and Security Review Commission, Hearing on China's Shifting Economic Realities and Implications for the United States, Panel 4 "Evaluating China's Non-Market Economy Status," 178-179 (Feb. 24, 2016). Also, in advance of a ruling on China's NME Status at the WTO Trump seems to foreshadow unwillingness to comply if he does not get his way. See Michael Martina and Steve Holland, *Trump Threatens More China Tariffs, Beijing Ready to Hit Back*, REUTERS, Apr. 6, 2018 <https://perma.cc/HD93-T5ED>.

<sup>115</sup> Michael Wessel, Opening Statement of Commissioner Michael Wessel Hearing Co-Chair, Testimony before the U.S.-China Economy and Security Review Commission, Hearing on China's Shifting Economic Realities and Implications for the United States, 3 (Feb. 24, 2016).

<sup>116</sup> Richard Lockridge, Doubling Down in Non-Market Economies: The Inequitable Application of Trade Remedies Against China and the Case for a New WTO Institution, 24 S. CAL. INTERDISC. L.J. 249, 259-261 (2014).

<sup>117</sup> See Submission of the Gov't of the People's Republic of China Ministry of Commerce to the U.S. Dep't of Com., on Antidumping Methodologies in Proceedings Involving Nonmarket Economy Countries: Surrogate Country Selection and Separate Rates, at 3 (Apr. 20, 2007), <https://perma.cc/XR5H-N7KN>.

*Not So Fast, China**Washington*

China has grown as an international economic powerhouse, from accounting for only 1% of international trade in 1978,<sup>118</sup> to more than 9% by 2011,<sup>119</sup> and now is recognized as the leading international exporter.<sup>120</sup> As China's importance as a trading nation has increased, its activity before the WTO has also multiplied to now represent more than a quarter of the WTO caseload.<sup>121</sup> China's prominence also comes at a time when the powerful trading economies (U.S., E.U., and Japan) have decreased the number of complaints they file against each other, resulting in an "Established Power(s) versus China" dynamic.<sup>122</sup> This highlights their resistance to China's enlarged role, which may seem irrational as they ignore signs of China's market progress,<sup>123</sup> and insist on continuing to treat it in NME fashion.

If China is dissatisfied with the resolution of this question, or feels that the outcome was arrived at unfairly, it might be tempted to leave the WTO Agreement and stake out its own course to resolve trading disputes.<sup>124</sup> Such a move would weaken the institution's legitimacy at a time when faith in its ability to craft clear rules and resolve conflict is already waning.<sup>125</sup> Further weakening may lead to a cascade of important economies electing not to bring their disputes before the body and seeking self-help methods instead.<sup>126</sup> This result may return international trade to undesirable levels of fragmentation.<sup>127</sup>

#### 1. Arguments in Favor of Continuing China's NME Status Post-Expiration.

Bernard O'Connor is one of the scholars who believes that China is not entitled to automatic MES after the expiration of Article 15(a)(ii) in 2016. In a column written in 2011, he analyzed the Protocol and concluded that in order for China to be recognized as a market economy by the E.U., it should comply with the explicit criteria of E.U. law.<sup>128</sup> The crux of O'Connor's argument is twofold. First, he argues that subparagraph (a)(ii) does not speak of granting MES, so its

<sup>118</sup> See Xiaojun Li, *China as a Trading Superpower*, in CHINA'S GEOECONOMIC STRATEGY, 25, 25 (Nicholas Kitchen ed., 2012).

<sup>119</sup> World Trade Organization, WORLD TRADE REPORT 2011, at 25 (2011).

<sup>120</sup> See John Miller & Marcus Walker, *China Dethrones Germany as Top Goods Exporter*, WALL STREET JOURNAL (Jan. 6, 2010), <https://perma.cc/R3C8-35VZ>; see also Steven Mufson, *China Surpasses Germany as World's Top Exporter*, WASH. POST (Jan. 11, 2010), <https://perma.cc/9PS3-WZM9>.

<sup>121</sup> Wu, *supra* note 15, at 262.

<sup>122</sup> *Id.* at 263–64.

<sup>123</sup> See generally Nicholas Lardy, *Markets over Mao* (2014).

<sup>124</sup> Wu, *supra* note 15, at 266.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 266–67.

<sup>127</sup> *Id.* at 267.

<sup>128</sup> O'Connor, *supra* note 24.

expiration should not result in MES. Second, subparagraph (a)(ii) it is not the only source of authority for NME methodologies in the protocol.<sup>129</sup>

O'Connor asserts that all other parts of Article 15 will continue to apply after the expiration of subparagraph (a)(ii). This is significant because other portions of Article 15 (namely the *chapeau*) introduce the possibility for WTO Members to use NME methodologies against China.<sup>130</sup> O'Connor next asserts that the portion of 15(d) that announces the expiration of (a)(ii) has no legal effect on the rest of 15(d).<sup>131</sup> This is also significant because 15(d) contains a provision that requires Chinese firms to prove under the "national law" of the importing country.<sup>132</sup> O'Connor concludes from these observations that since China is still subject to the market-economy standards announced under the "national law" of the importing country, and the *chapeau* permits NME methodologies, importing countries could deem China an NME under 15(d) and impose NME methodologies under the *chapeau* to Article 15 of the Protocol.<sup>133</sup>

The U.S. fervently disagrees with the notion that the expiration of Section 15(a)(ii) of China's Accession Protocol removes WTO Members' ability to reject non-market domestic prices and replaces them with surrogate country prices in antidumping investigations.<sup>134</sup> Under its interpretation, the Protocol is a "specific expression of the principle that [price] comparability needs to be ensured."<sup>135</sup> "Price comparability" is the requirement that the price used in the dumping margin calculation be a "comparable market-determined price." The expiration of 15(a)(ii) only means that the rule set out in that provision does not apply beyond fifteen years, and so it does not take away the basic "price comparability" requirement that flows from Article VI:1 of the GATT 1994.<sup>136</sup> Even after the expiration of that particular rule, if "market-economy conditions do not prevail in China or in the industry or sector under investigation, then 'comparable' prices or costs do not exist," and Article VI:1 of the GATT 1994 would still require "surrogate country" prices in or to attain proper "price comparability."<sup>137</sup>

In order to appreciate the force of this interpretation, it is important to understand the concept of "price comparability." For the U.S., price comparability starts with comparison of export and domestic prices.<sup>138</sup> In order for the export

<sup>129</sup> *Id.*

<sup>130</sup> Accession Protocol, *supra* note 19, at Chapeau to art. 15.

<sup>131</sup> O'Connor, *supra* note 24.

<sup>132</sup> Accession Protocol, *supra* note 19, at art. 15(d).

<sup>133</sup> O'Connor, *supra* note 24.

<sup>134</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 1.

<sup>135</sup> *Id.* at ¶ 117.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> GATT, *supra* note 2, at art. VI:1(a).

*Not So Fast, China**Washington*

and domestic prices to be comparable, the domestic price must be a “comparable price.”<sup>139</sup> A comparable price is one that is determined in the “ordinary course of trade” or market-determined.<sup>140</sup> Price comparability cannot exist without a comparable price, and a comparable price cannot exist if it is not market-determined.

Some practitioners of international trade law also agree that China does not automatically receive MES unless “Chinese producers can show that they operate under market economy conditions.”<sup>141</sup> Flynn, these trade attorneys reiterate that the expiration of 15(a)(ii) does not affect the rest of the Article, parts of which they believe also create the obligation for Chinese producers to prove MES under the national law of the importing country.<sup>142</sup> These practitioners further buttress their position with functional policy arguments, stating that “there is a great deal of evidence showing that China is not a market economy,”<sup>143</sup> and therefore “to require WTO members to apply [MES] . . . would be contrary to the underlying purpose of [Article] 15.”<sup>144</sup> As discussed at the beginning of this Section, that purpose is to help China to continue its progress toward becoming a full market economy.<sup>145</sup> To grant it MES before that is achieved would indeed defeat that stated intent.

## 2. Arguments against Continuing China’s NME Status Post-Expiration.

There are some scholars who fervently believe that China is either entitled to MES or that such status is inevitable and ought to be granted for policy reasons. These positions are discussed in this Subsection.

Professors Christian Tietje and Karsten Nowrot analyzed the text of the Protocol and of Article VI:1 of the GATT 1944 and reached the conclusion that following the expiration of 15(a)(ii) no WTO member has the authority to treat China as an NME.<sup>146</sup> The foundation for their argument is the assertion that under

<sup>139</sup> *Id.* at ¶ 1.

<sup>140</sup> *Id.* at ¶ 5.

<sup>141</sup> Alan H. Price, Timothy C. Brightbill and D. Scott Nance, *China Can Still Be Treated As a Nonmarket Economy After 2016*, LAW360 (Oct. 16, 2015), <https://perma.cc/4FDZ-YHE4> [hereinafter *Price, Brightbill, and Nance*].

<sup>142</sup> *Id.*; Flynn, *supra* note 113.

<sup>143</sup> Price, Brightbill, and Nance, *supra* note 141, at ¶ 9 (pointing to “the Chinese government continues to play the dominant role in the allocation of resources within the Chinese economy; and that prices for key inputs, including land, energy and credit, are not set by the market.”).

<sup>144</sup> *Id.*

<sup>145</sup> See China Working Party Report *supra* note 97 and accompanying text.

<sup>146</sup> Christian Tietje & Karsten Nowrot, Myth or Reality? China’s Market Economy Status Under WTO Anti-Dumping Law After 2016, 34 TRANSNAT’L ECON. L. CTR. 5, 11 (2011).

*Chicago Journal of International Law*

WTO law there are only two ways of dealing with NMEs. The first is the Second *Ad Note* of Art. VI:1. The second is the Accession Protocol of each country.<sup>147</sup>

Tietje et al. argue that it is the addendum that “opens up the possibilities to determine normal value of products by using methodology as deemed appropriate by the investigating countr[ies].”<sup>148</sup> Since it is the addendum that introduces the authority to deviate from the settled norm of the WTO regulations, taking advantage of that exception must conform to the requirements therein.<sup>149</sup> The requirements of the addendum—(1) “complete or substantially complete” government monopoly and (2) “all domestic prices are fixed by the state”—are difficult to find in any country.<sup>150</sup> A transitional economy like China would not qualify for MES under this definition because those conditions are not met, so using alternative methodologies will not be permitted under this provision. Absent authority under the addendum, a WTO member would have to rely on the country’s accession protocol.

Article VI:1 and the ADA, according to Tietje, are “subject to important modifications on the basis of relevant stipulations enshrined in China’s accession protocol.”<sup>151</sup> Again, Tietje asserts that it is “precisely [Section 15(a)] that, at present, essentially permits other WTO members to deviate from the requirements of Art. 2(1) WTO ADA,”<sup>152</sup> and argues that the language of 15(d) supports this understanding. They are careful to clarify that the expiration of 15(a)(ii) “does not explicitly grant China MES” magically, but “it essentially creates a situation where other WTO members are no longer permitted” to use alternative methodologies.<sup>153</sup>

Tietje et al.’s final claim is that following the expiration of 15(a)(ii), the burden of proof shifts to the importing country to prove that China is an NME.<sup>154</sup> However, per their understanding, the standard of proof would be according to the addendum and not the national law of the importing country,<sup>155</sup> a standard which most authorities believe is unprovable in the case of China.

Laura Puccio, a researcher for the European Parliament, also argues the validity of the position that the expiration of 15(a)(ii) would mark a shift in the

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<sup>147</sup> *Id.* at 4.

<sup>148</sup> *Id.* at 4.

<sup>149</sup> *Id.* at 4.

<sup>150</sup> *Id.* at 4, 10

<sup>151</sup> *Id.* at 5.

<sup>152</sup> *Id.* at 6.

<sup>153</sup> *Id.* at 7.

<sup>154</sup> *Id.* at 10.

<sup>155</sup> *Id.* at 10.

*Not So Fast, China**Washington*

burden of proof.<sup>156</sup> Contrary to the position held by Tietje et al., however, Puccio argues that the conditions to be proved are those required under “the domestic law of the importing country imposing the AD measure.”<sup>157</sup> This interpretation flows from the language of Section 15(d), which requires China to make proofs under the “national law” of the importing country.<sup>158</sup> According to Puccio, Tietje et al.’s position that the strict definition of an NME under the addendum is required would “*de facto* allow a circumvention of the requirement under Section 15(d),” which provides for country-wide MES under domestic law.<sup>159</sup> In this way, MES is not automatic, and NME is not hard to prove for the importing country.

In this Section, this Comment has so far demonstrated that the current debate on China’s economic status does not occur in a vacuum. Many years before China joined the WTO, other members took pains to get assurances from China that it would liberalize its domestic market in order to make trade with it suitable for the international system. The concessions made by China and WTO Members as reflected in the Working Party report and the Protocol itself represent an agreement by the parties to promote that goal. The present debate on the implications of the expiration of 15(a)(ii) should not be considered absent that background. Some scholars have taken that background into account when interpreting the text. Others have approached the issue on a purely textual basis.

In the next Section, this Comment proposes additional context for practitioners and scholars to consider when interpreting the expiration of 15(a)(ii): the WTO Agreements, specifically Article VI and the ADA. This Comment will argue that these agreements will have a larger impact on the treatment of China no matter what conclusions are drawn on when interpreting 15(a)(ii) and the implications of its expiration on China’s economic status.

#### IV. NME STATUS IS NOT A NECESSARY PRECONDITION FOR THE APPLICATION OF THE SURROGATE COUNTRY METHOD

Though well-reasoned and grounded in the text of the applicable legal provisions, the arguments above miss a larger point. In this Section, this Comment will revisit the legal authority for WTO members to apply the “surrogate country” method and argue that, while sufficient to justify its use, NME status is not a necessary prerequisite.

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<sup>156</sup> Laura Puccio, *Granting Market Economy Status to China, An Analysis of WTO Law and of Selected WTO Members’ Policy*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, 7 (Nov. 2015), <https://perma.cc/B8DT-5CV2>.

<sup>157</sup> *Id.* at, 4, 12.

<sup>158</sup> *Id.* at 7.

<sup>159</sup> *Id.* (emphasis in original).

*Chicago Journal of International Law*

There are two relevant provisions that allow using alternative pricing methodologies under certain circumstances. Both provide a solid legal foundation for national authorities to use third country prices against China regardless of an overall NME determination. These provisions are Article VI of the GATT 1994 and Article 2 of the Antidumping Agreement.

## A. Article VI of the GATT

The first justification for using alternative pricing methodology comes from Article VI of the 1994 GATT:

“a product is to be considered as being [dumped], if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade... or (b) in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade.”<sup>160</sup>

This language indicates that normal value must be market-determined.<sup>161</sup> Under this notion, price comparability<sup>162</sup> is the objective that drives the force of this requirement. In its third-party submission,<sup>163</sup> the U.S. supports this conclusion by pointing to the historical practice of WTO Members of applying members applying Article VI in antidumping investigations. This historical practice, which reveals a common understanding among all contracting parties, is the foundation of its belief that Article VI requires market-determined prices.

In a review<sup>164</sup> of legislation passed by contracting parties to implement Article VI, the GATT Secretariat confirmed the understanding that Article VI requires market-determined prices for “price comparability.”<sup>165</sup> The Secretariat’s analysis focused on the fact that contracting parties “universally relied on market-determined prices” for the bases of the calculations.<sup>166</sup> Furthermore, the Secretariat also deemed the “application of duties to be practically in conformity with the obligations laid down” in Article VI.<sup>167</sup> In summarizing its review, the Secretariat states: “There is a clear tendency [among all contracting parties] to arrive at a normal value which is really a comparable value . . . namely to base the

<sup>160</sup> GATT, *supra* note 2, at art. VI:1

<sup>161</sup> U.S. Legal Interpretation, *supra* note 25, at § 116.

<sup>162</sup> See *supra* note 139 and surrounding text.

<sup>163</sup> See generally U.S. Legal Interpretation, *supra* note 25.

<sup>164</sup> GATT, Antidumping and Countervailing Duties: Secretariat Analysis of Legislation, 10-11 (Oct. 23 1957) [hereinafter *Legislation Analysis*].

<sup>165</sup> U.S. Legal Interpretation, *supra* note 25, at § 5.

<sup>166</sup> Legislation Analysis, *supra* note 164, at 5-6.

<sup>167</sup> *Id.* at 5-6.

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normal value on a similar product . . . or on prices in a third countries . . . due to the lack of comparable figures.”<sup>168</sup> This review reveals that at least since 1957, contracting parties apply Article VI in a manner that demonstrates an awareness that it provides the legal authority to calculate normal value on the basis of market-determined prices.<sup>169</sup> Based on this history, Article 31(3)(b) of the Vienna Convention on the Law of Treaties<sup>170</sup> leads to the conclusion that a “subsequent practice in the application of Article VI” established an agreement by the contracting Parties of the meaning of Article VI.<sup>171</sup>

Historical practice also reveals that “non-market economy prices and costs may be rejected pursuant to Articles VI:1 and VI:2 of GATT 1994.”<sup>172</sup> The various accessions of non-market economies (Poland, Romania, and Hungary) contain understandings in the Working Party Reports that the protocols did not create exceptions to what already exists under the Article, but instead they simply recognized a pre-existing ability to reject non-market economy prices.<sup>173</sup> When Poland, a non-market economy, acceded in 1967, the Working Party recognized that authority to reject Polish prices flowed from Article VI.<sup>174</sup> The same was true for the accessions of Romania in 1971 and Hungary in 1973.<sup>175</sup> None of the protocols contained legally operative language in relation to rejecting non-market economy prices. Instead in all Working Party Reports, the members relied on the legal authority of Article VI.<sup>176</sup> As in the case of the Secretariat review,<sup>177</sup> these three instances of accession amount to a subsequent practice establishing agreement on the interpretation of Article VI:1 of the GATT.<sup>178</sup>

One complication for this interpretation of Article VI is the Second *Ad Note*. The Second *Ad Note* says that, “in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability.”<sup>179</sup> This is a problem because few countries have

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<sup>168</sup> *Id.* at 11.

<sup>169</sup> U.S. Legal Interpretation,, *supra* note 25, at 4, 10-11

<sup>170</sup> Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1963, No. 18232 (“There shall be taken into account, together with the context . . . Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

<sup>171</sup> U.S. Legal Interpretation, *supra* note 25, at § 114.

<sup>172</sup> *Id.* at § 128.

<sup>173</sup> *Id.* at § 128.

<sup>174</sup> *Id.* at § 118..

<sup>175</sup> *Id.* at § 118.

<sup>176</sup> *Id.* at § 128.

<sup>177</sup> Legislation Analysis, *supra* note 164.

<sup>178</sup> U.S. Legal Interpretation, *supra* note 25, at § 6.

<sup>179</sup> GATT, *supra* note 2, at *Second Addendum Note*, art. VI:1..

*Chicago Journal of International Law*

a complete monopoly over their trade or set prices for all products domestically. If it is the case through the Second *Ad Note* special difficulties exist only in these specific situations, then few countries, including China, would satisfy this requirement.

However, the U.S. has argued this provision can be interpreted as merely one example in which “special difficulties may exist in determining price comparability.”<sup>180</sup> This is the proper conclusion for two reasons. First, there is no text in Article VI:1, nor in the addendum which suggests that the described example is “the exclusive situation” where special difficulties may exist.<sup>181</sup> Merely describing one situation where there may be an exception to the rule “does not logically imply that there could be no other ‘case.’”<sup>182</sup> Second, Article VI already recognizes that there are pricing difficulties in some situations. One of those situations is the absence of market-determined prices in the domestic market, and Article VI provides that countries may resort to alternative methods in that situation.<sup>183</sup>

#### B. Article 2 of the Antidumping Agreement

The Antidumping Agreement gives further details on the implementation of Article VI for the Contracting Parties. The two agreements together must be interpreted coherently such that each provision is given relevant meaning.<sup>184</sup>

Article 2 of the Antidumping Agreement confirms the principle of price comparability expressed in Article VI:1 of the GATT 1994.<sup>185</sup> A side-by-side comparison of the language employed in both agreements will be helpful to highlight the drafters’ intent to recreate the same legal obligations.

Article VI:1, GATT 1994		Article 2, ADA	
<b>1(a)</b>	A product is to be considered as being introduced at less than its normal value, if the price is	<b>2.1</b>	Product . . . [is] being dumped, i.e. introduced . . . at less than the normal value, if

<sup>180</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 113.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See Appellate Body Report Shrimp, *supra* note 47, at, ¶ 233 (“Article VI of the GATT 1994 (including the *Ad Note*) and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines.”).

<sup>185</sup> ADA, *supra* note 35, at ¶ 2.2.

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	“less than the comparable price, in the ordinary course of trade”		“less than the comparable price, in the ordinary course of trade”
<b>1(b)</b>	In the absence of such domestic price, [it is dumped if price] is less than  “highest comparable price” “to any third country in the ordinary course of trade”, or  The cost of production plus reasonable profit etc.	<b>2.2</b>	When there are no sales in the domestic market, or because of <i>the particular market situation</i> . . . margin of dumping is determined by comparison to:  Comparable price when exported to an appropriate third country  Cost of production . . . plus reasonable profit etc.

As discussed previously, price comparability is the idea that in order to calculate the margin of dumping the price used for the normal value of the imported product must represent “market-determined price or cost” in order to permit a “proper comparison.”<sup>186</sup> The U.S. has argued that prices are not properly comparable when they are not market-determined (or “determined under market economy conditions for the industry under investigation”),<sup>187</sup> and that thus, alternative sources are required for the calculation of normal value.<sup>188</sup> The requirement under the ADA to make a “proper comparison” is the same requirement that permits, or even compels, the use of “surrogate country” prices to calculate the margin of dumping.

The features of Article 2 of the ADA are consistent with this interpretation. The first aspect of the article supporting this interpretation is the language it employs similar to the GATT: “a product is to be considered as being dumped . . . if the export price of the product being exported from one country to another is less than the comparable price, in the ordinary course of trade.”<sup>189</sup> The same language appears in Article VI:1(a) of the GATT 1994. With the same language

<sup>186</sup> *Id.* (internal quotations omitted).

<sup>187</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 116..

<sup>188</sup> *Id.* at ¶ 113.

<sup>189</sup> ADA, *supra* note 35, at art. 2.1.,

*Chicago Journal of International Law*

comes the same legal authority to discard non-market-determined prices in favor of market prices in order to make a “proper comparison.”<sup>190</sup>

Beyond recreating the same principle established in Article VI of the GATT, Article 2 of the ADA introduces a new principle which itself might also independently permit the use of third-country prices. The ADA says that a “particular market situation” might warrant the use of alternative pricing methodologies in order to make a “proper comparison” of export prices and normal value.<sup>191</sup>

While the notion of a particular market situation may seem vague on its face, and while such uncertainty is compounded by the absence of a definition in the ADA, the broadest definition supported by the text is a market situation that affects the terms of sale and the domestic price of the product. This definition is divined from the purpose of Article 2 of the ADA. The provision serves to designate a reason that investigating authorities should depart from normal price comparisons and shift to alternative pricing methodologies. The baseline situation creates a domestic price “in the ordinary course or trade.” So, this particular situation must create domestic prices that are not in the ordinary course of trade. This reasoning leads to the conclusion that a particular market situation must be very broad.

Next, it must be established that it is the “sales themselves” that take place in a particular market situation and do not permit a proper comparison.<sup>192</sup> This is not referring to a general market situation, but instead the situation surrounding the sale. Since those sales are unfit for a proper comparison, it forces the importing country to look to other sales of a like product but under the conditions of a market economy.

Some WTO members have interpreted the “particular market situation” with respect to those sales as “government control over pricing, interference with competitively set prices, artificially low prices, barter trade, or non-commercial processing arrangements.”<sup>193</sup> Such a detailed definition is not necessary because the text of Article 2 is broad enough to encompass many definitions defining a distorted market situation.

Other interpretations were also offered during the Kennedy Round discussion for the Antidumping Code. Representatives from MES and NME countries all enumerated certain conditions that might satisfy their interpretation

<sup>190</sup> U.S. Legal Interpretation, *supra* note 25, at § 118.

<sup>191</sup> ADA, *supra* note 35, at art. 2.2.

<sup>192</sup> Panel Report, European Communities—Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil, ¶ 478, WTO Doc. ADP/137 (adopted July 4, 1995) [hereinafter *Duties on Cotton Yarn*].

<sup>193</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 7.6.1.2.

*Not So Fast, China**Washington*

of a “particular market situation.”<sup>194</sup> Some of the noted conditions were: “structural imbalance arising from the development process,” “inadequacies of technology,” “insufficient transport facilities,” “weak marketing and distribution services,” “[m]easures taken for balance-of-payments reasons or developmental purposes,”<sup>195</sup> and “prices of domestically produced and imported essential raw materials as well as intermediate products . . . at artificially high levels.”<sup>195</sup> These conditions all indicate a departure from the normal market situation of a market-economy and are believed to contribute to distorted prices.

Consistent throughout these interpretations and proposed conditions of a “particular market situation” is the notion that the normal market value of products can be distorted by external forces. There is no reason to think that these distortions must occur on a system-wide level. Instead, it is entirely consistent with the general understanding in these definitions to conclude that a “particular market situation” is broad enough to also include distortions at the level of individual sales. For example, distortions may result from direct or indirect subsidies from the government. Governmental subsidies are present even in so-called market-economy countries. There are also less direct forms of government interference that may cause market distortions without system-wide governmental control. Such interference may be brought about by regulations that limit the production of certain products, or a hostile or inhospitable political environment.

In China, such market distortions may result from the CCP involvement in government, or the fact that the government owns four of the largest banks in the world. Even with the expiration of Article 15(a)(ii) of the Accession Protocol, China remains a member of the WTO agreement and is subject to the requirements of the GATT and the ADA. Under the agreements, a WTO Member that seeks to employ the surrogate country method against China would first demonstrate that the product it is investigating lacks comparable prices in China’s domestic market. They can prove this fact by pointing to any of the discrete ways in which the government is involved in China’s economy and build the case for a causal link from those interventions to the distortion. Once the chain is developed, the WTO Member would rely on Article VI:1 and Article 2 of the ADA to disregard those prices because they are not comparable. Next, the Member would point to the “particular market situation” language as the basis for employing the surrogate country method.

One final note: if China remains subject to alternative methods even as some countries recognize it as a market economy, then the method of treating countries with NME methods could be applied to any WTO member so long as a “particular market situation” is proven. The status of the country itself does not matter, it is

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<sup>194</sup> ADA, *supra* note 35, at art. 2,2 .

<sup>195</sup> GATT Anti-Dumping Duties, ¶ 3.2(i), WTO Doc. MTN/INF/30, (June 30 1978).

“the sales themselves.”<sup>196</sup> Such a result would lead to a more frequent deployment of protectionist methods by MES countries against other MES countries. It is beyond the purview of this Comment to take a position on the desirability of this outcome.

## V. CONCLUSION

The expiration of Section 15(a)(ii) of the Chinese Accession Protocol created an opportunity for China to pressure Western Nations into granting it MES under their own national laws. It was politics, not law, that led to these decisions. The law is clear that the protocol has not created legal rights to classify China's economy or to employ alternative methods. NME status is irrelevant, and the source for these methods is instead embedded in the text of Article VI of the GATT 1994 and Article 2 of the ADA. The U.S. and E.U. are not interested in ignoring the special situation happening in China's economy because protecting the domestic economy is a high priority of the new political regimes.

The texts of Article VI:1 and Article 2 of the ADA state that the antidumping investigation requires “comparable prices, in the ordinary course of trade.” The ordinary course of trade is a market situation, absent external distortions, based on supply and demand. Distortions are not absent from China's market. More importantly Article 2 of the ADA introduces the idea of a “particular market situation.” This principle is broad enough to encompass various situations that are not simply NME status. So, no matter the consequence of the expiration of Article 15(a)(ii) on China's official market status, WTO Members can still rely on a “particular market situation” determination to employ alternative pricing methodologies. Since the “particular market situation” focuses on the sales themselves, and not a general market status, a full-blown MES country could be subject to alternative pricing methodologies if the situation of the sales of an exported product were distorted by external forces other than supply and demand.

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<sup>196</sup> See Duties on Cotton Yarn, *supra* note 192, at ¶ 478.

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 Moot Court Experience **No**

**Bar Admission****Prior Judicial Experience**

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## **Specialized Work Experience**

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July 11, 2023

The Honorable Stephanie D. Davis  
United States Court of Appeals for the Sixth Circuit  
Potter Stewart U.S. Courthouse  
100 East Fifth Street  
Cincinnati, Ohio 45202

Dear Judge Davis:

I am writing to apply for a clerkship in your chambers during the 2024-2025 term. I graduated from Washington and Lee University School of Law in 2022, and I currently clerk for the Honorable Ivan D. Davis. Beginning in September, I will be a litigation associate at McDermott Will & Emery.

Through my professional and academic experiences, I developed strong legal research and writing skills that will assist me as an appellate law clerk. I interned for Judge Gregory my 1L summer, worked for Mayer Brown my 2L summer, and served as Editor in Chief of *Washington and Lee's Journal of Civil Rights & Social Justice* my 3L year. While interning for Judge Gregory, I worked on a concurring opinion concerning the same sentencing enhancement that the court applied to my father. That experience made me fall in love with appellate work and is the main reason I'm seeking an appellate clerkship.

On a personal note, watching my father get sentenced to 180 months in federal prison is the reason I decided to go to law school. Given the depth of your experience as an Assistant United States Attorney, I know a clerkship in your chambers would afford me a rich opportunity to keep expanding my practice as a young litigator. I believe I share your commitment to justice and hope to gain exposure to your approach to the law.

Enclosed are my resume, transcript, and writing sample. I welcome the opportunity to discuss my qualifications in greater detail. Please let me know if I can provide you any additional information or materials.

Sincerely,

Chris Watts

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**EDUCATION**

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**WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, Lexington, VA**

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- *Editor in Chief*, Washington and Lee Journal of Civil Rights and Social Justice
  - Publication: Student Note, *Senseless Sentencing: The Uneven Application of the Career Offender Guideline* for publication in Volume 28 of the Washington and Lee Journal of Civil Rights & Social Justice
- Sub Regional Director of Virginia: Mid Atlantic BLSA (April 2020 – March 2021)
- Moot Court Experience:
  - Winner, Robert J. Grey, Jr. Negotiations Competition
  - Sixth Place, American Bar Association Regional Negotiations Competition
  - Winner, Washington & Lee Mediations Competition
  - Quarterfinalist, National Black Law Student Association Constance Baker Motley Mock Trial Competition
  - Third Place, Mid Atlantic Black Law Student Association Constance Baker Motley Mock Trial Competition

**POINT UNIVERSITY, West Point, GA**

*Bachelor of Science*, Criminal Justice, Minor in Biblical Studies (2019)

- Accolades: Captain, Point University Football Team, Academic All American (2018)

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**EXPERIENCE**

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**McDermott Will & Emery LLP**

*Incoming Associate*, September 2023 –

**U.S. District Court for the Eastern District of Virginia, Alexandria**

*Law Clerk for Judge Ivan Davis*, August 2022 – August 2023

- Conduct legal research, apply legal frameworks, author precise analysis, and prepare advisory materials in advance of hearings.

**Mayer Brown LLP**

*Summer Associate*, May 2021 – July 2021

- Mayer Brown Diversity Scholarship Recipient
- Litigation assignments, including drafting research memorandum and document review

**U.S. Court of Appeals for the Fourth Circuit, Richmond, VA**

*Judicial Intern for Chief Judge Roger L. Gregory*, June 2020 – August 2020

- Researched and drafted a concurring opinion
- Wrote a bench memorandum for a death penalty case
- Researched and edited judicial opinions in both civil and criminal cases

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**ACCOLADES & INTERESTS**

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- Eagle Scout (2014); Order of The Arrow (2014)
- Omicron Delta Kappa (ODK) (2020)
- Interests: sous vide cooking, homemade pasta, dolphin watching

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05/13/2022

## COURSE ATT COM GRADE POINTS

## LAW-FALL SEMESTER 2019-20

COURSE	ATT	COM	GRADE	POINTS
LAW 109 CIVIL PROCEDURE	4.0	4.0	B-	10.68
LAW 140 CONTRACTS	4.0	4.0	B+	13.32
LAW 163 LEGAL RESEARCH	0.5	0.5	C+	1.17
LAW 165 LEGAL WRITING I	2.0	2.0	B	6.00
LAW 190 TORTS	4.0	4.0	B+	13.32
Term Cmpl Cr: 14.5	GPA Pts: 44.49	GPA Cr: 14.5	GPA: 3.068	
Cumul Cmpl Cr: 14.5	GPA Pts: 44.49	GPA Cr: 14.5	GPA: 3.068	

The COVID-19 pandemic required significant academic changes. Unusual enrollment patterns and grading reflect the disruption of the time, not necessarily the student's work.

## LAW-SPRING SEMESTER 2019-20

COURSE	ATT	COM	GRADE	POINTS
LAW 130 CONSTITUTIONAL LAW	4.0	4.0	CR	0.00
LAW 150 CRIMINAL LAW	3.0	3.0	CR	0.00
LAW 163 LEGAL RESEARCH	0.5	0.5	CR	0.00
LAW 166 LEGAL WRITING II	2.0	2.0	CR	0.00
LAW 179 PROPERTY	4.0	4.0	CR	0.00
LAW 195 TRANSNATIONAL LAW	3.0	3.0	CR	0.00
Term Cmpl Cr: 16.5	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000	
Year Cmpl Cr: 31.0	GPA Pts: 44.49	GPA Cr: 14.5	GPA: 3.068	
Cumul Cmpl Cr: 31.0	GPA Pts: 44.49	GPA Cr: 14.5	GPA: 3.068	

## LAW-FALL SEMESTER 2020-21

COURSE	ATT	COM	GRADE	POINTS
LAW 285 EVIDENCE	3.0	3.0	A-	11.01
LAW 289 FAMILY LAW	3.0	3.0	A-	11.01
LAW 309 GLOBAL LEGAL PROFESSION SEM	2.0	2.0	A-	7.34
LAW 446P VETERANS LAW PRACTICUM	4.0	4.0	A	16.00
LAW 514 INTER-SCHOOL NEGOTIATION COMP	1.0	1.0	CR	0.00
LAW 570 JOURNAL/CIV RGTS & SOCIAL JUST	1.0	1.0	CR	0.00
Term Cmpl Cr: 14.0	GPA Pts: 45.36	GPA Cr: 12.0	GPA: 3.780	
Cumul Cmpl Cr: 45.0	GPA Pts: 89.85	GPA Cr: 26.5	GPA: 3.391	

## LAW-SPRING SEMESTER 2020-21

COURSE	ATT	COM	GRADE	POINTS
LAW 202P ADVANCED FAMILY LAW PRACTICUM	4.0	4.0	A-	14.68
LAW 204P ADV PROC:ENVIRON LIT PRACT	3.0	3.0	A	12.00
LAW 206 ADVANCED LEGAL WRITING	2.0	2.0	B+	6.66
LAW 390 PROFESSIONAL RESPONSIBILITY	3.0	3.0	A	12.00
LAW 519 INTER-SCHOOL MOCK TRIAL COMP	1.0	1.0	CR	0.00
LAW 570 JOURNAL/CIV RGTS & SOCIAL JUST	1.0	1.0	CR	0.00
Term Cmpl Cr: 14.0	GPA Pts: 45.34	GPA Cr: 12.0	GPA: 3.778	
Year Cmpl Cr: 28.0	GPA Pts: 90.70	GPA Cr: 24.0	GPA: 3.779	

(continued in next column)

## COURSE ATT COM GRADE POINTS

Cumul Cmpl Cr: 59.0 GPA Pts: 135.19 GPA Cr: 38.5 GPA: 3.511

## LAW-FALL SEMESTER 2021-22

COURSE	ATT	COM	GRADE	POINTS
LAW 228 CIVIL RIGHTS SEMINAR	2.0	2.0	A-	7.34
LAW 300 FED JURISDICTION & PROCEDURE	3.0	3.0	P	0.00
LAW 407 SKILLS IMMERSION - BUSINESS	2.0	2.0	P	0.00
LAW 477P GLOBAL CORRUPTION LAW PRACTICUM	5.0	5.0	A-	18.35
LAW 570 JOURNAL/CIV RGTS & SOCIAL JUST	1.0	1.0	CR	0.00
Term Cmpl Cr: 13.0	GPA Pts: 25.69	GPA Cr: 7.0	GPA: 3.670	
Cumul Cmpl Cr: 72.0	GPA Pts: 160.88	GPA Cr: 45.5	GPA: 3.536	

## LAW-SPRING SEMESTER 2021-22

COURSE	ATT	COM	GRADE	POINTS
LAW 229P CIVIL LITIGATION PRACTICUM	5.0	5.0	B+	16.65
LAW 248 CORE UNIFORM COMM CODE (UCC) C	3.0	3.0	P	0.00
LAW 417P STATUTORY INTERPRETATION PRAC	4.0	4.0	A-	14.68
LAW 570 JOURNAL/CIV RGTS & SOCIAL JUST	1.0	1.0	CR	0.00
Term Cmpl Cr: 13.0	GPA Pts: 31.33	GPA Cr: 9.0	GPA: 3.481	
Year Cmpl Cr: 26.0	GPA Pts: 57.02	GPA Cr: 16.0	GPA: 3.564	
Cumul Cmpl Cr: 85.0	GPA Pts: 192.21	GPA Cr: 54.5	GPA: 3.527	

## LAW-SPRING SEMESTER 2021-22 GRADUATION

JURIS DOCTOR 05/13/2022

Cumul Cmpl Cr: 85.0 GPA Pts: 192.21 GPA Cr: 54.5 GPA: 3.527

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Registrar

PAGE 1 of 1

WASHINGTON AND LEE UNIVERSITY  
SCHOOL OF LAW  
LEXINGTON, VA 24450

July 14, 2023

The Honorable Stephanie Davis  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard, Room 1023  
Detroit, MI 48226

Dear Judge Davis:

I am writing this letter on behalf of Christopher Watts to personally recommend him for a clerkship position. I am eager to write this letter as Mr. Watts was one of the most driven and accomplished students that I have encountered here at W&L Law. As will be further discussed in this letter, he has truly maximized his law school experience by pursuing a range of leadership roles while simultaneously earning a myriad of accolades.

I have known Christopher Watts since May 2020, when he was my research assistant during the first summer following the onset of the COVID-19 pandemic. His primary assignment was to research the origins of the investor protection justifications of the federal securities laws. Mr. Watts was further assigned to gather relevant case law on prevailing circumstances in which contracts are deemed unconscionable. Despite having to meet virtually for the duration of the summer, Mr. Watts' questions and comments were poignant and reflected his aptitude for critically assessing the nuanced layers of the law. His final written memoranda reflected his exceptional talent. Mr. Watts effortlessly incorporated complicated legal concepts into his eloquently written responses. His performance was even more remarkable as he concurrently served as a judicial intern for Chief Judge Roger L. Gregory of the U.S. Court of Appeals for the Fourth Circuit during this same summer.

I also served as Mr. Watts' faculty advisor for his Student Note, Senseless Sentencing: The Uneven Application of the Career Offender Guideline. I was thoroughly impressed by his ability to cultivate an innovative solution to an intricate circuit split. As to be expected, his Student Note was selected for publication in Volume 28 of the Washington and Lee Journal of Civil Rights and Social Justice. I was beyond thrilled when Mr. Watts was then appointed the Editor in Chief of this same journal shortly thereafter. His innate leadership skills coupled with his sharp intellect will invariably lead to great success in this role.

As provided in his résumé, Mr. Watts is actively involved in a variety of professional and extra-curricular activities which have considerably enriched his skills as an aspiring lawyer. For example, Mr. Watts has achieved numerous accolades in relation to his moot court experience such as winning the Robert J. Grey, Jr. Negotiations Competition, and the Washington & Lee Mediations Competition. He then served as a BLSA and Undergraduate Mock Trial Coach, and as the Virginia Sub- Regional Director of the Mid-Atlantic BLSA. Mr. Watts has most recently secured a highly coveted summer associate position with Mayer Brown LLP, where he is also a Diversity Scholarship Recipient.

Outside of my formal supervisory roles, I frequently interacted with Mr. Watts during office hours. During these informal meetings, it became quite evident that Mr. Watts is an exceptionally talented and mature student who possesses an inherently strong work ethic, superior critical thinking skills, and a tenacious drive to succeed at the highest of levels. These attributes will undoubtedly provide an invaluable contribution to the broader legal community. I am greatly looking forward to witnessing his success continue to unfold in this field.

Please feel free to contact me directly at my cell number or email below if you have questions or concerns regarding this letter.

Respectfully,

Cary M. Shelby  
Professor of Law  
Cell Phone: 708-368-3371

Please Note: As of July 1, 2023 - Professor Shelby is at Chicago-Kent Law School as the Ralph Brill Chair in Law.

Cary Martin - Shelby - cshelby@wlu.edu - --

WASHINGTON AND LEE UNIVERSITY  
SCHOOL OF LAW  
LEXINGTON, VA 24450

July 13, 2023

The Honorable Stephanie Davis  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard, Room 1023  
Detroit, MI 48226

Dear Judge Davis:

I am on the faculty at Washington and Lee University School of Law, and am writing to you in very enthusiastic support of Chris Watts, a 2022 graduate, who is seeking a clerkship with your court.

I first met Chris when he was considering W&L as an admitted student, and he impressed even in that short initial meeting. I got to know him quite well shortly after he matriculated at W&L in the Fall of 2019, when he was selected as a competitor on one of the law school's Black Law Students Association ("BLSA") mock trial teams, of which I am the faculty coach. Over the course of the 2019-2020 academic year, Chris and I spent countless hours working closely together on BLSA's open universe mock trial problem. Even as a 1L, Chris demonstrated an extraordinary ability to identify, analyze and research legal issues, construct cogent legal arguments, and deploy those arguments in the factual universe the mock trial problem presented. Chris also revealed himself to be a gifted natural advocate, a tremendous team builder and team player, a very hard worker, and an all-around terrific young man. It is no accident that Chris' four-person team advanced from BLSA mock trial regional competition to national competition and then to the quarter-finals at nationals – although he was only a 1L, Chris was truly indispensable to the team.

Over the course of the following summer, I was pleased to have Chris over for dinner on my back deck on a number of occasions (Chris remained in Lexington as he worked remotely for Judge Roger L. Gregory). We talked often about Chris's experience working in Judge Gregory's (virtual) chambers. It was apparent that Chris was deeply engaged in and enthusiastic about the work, and that he thrived on the intellectual rigor it demanded. In my view, Chris's experience in Judge Gregory's chambers was transformative for him - it crystallized the path in the law that Chris hopes to follow, and laid the groundwork for the excellent work Chris did during his 2L year.

Chris and I continued to work and learn together while Chris was a 2L, so I experienced first-hand how Chris's writing and research skills continued to blossom after his summer with Judge Gregory. Chris was enrolled in, and performed very well in, my Evidence class, where (in addition to a cumulative multiple-choice final exam) the work included drafting briefs and arguing two complex motions in limine involving character evidence and expert witnesses. Chris was on the bubble between an A and A- in my class, but only because he disappointed himself a bit on my final exam: his briefs and oral arguments were excellent. Chris also informally consulted with me on the piece that became in his published journal note and ultimately resulted in his selection as editor-in-chief of the law school's Journal of Civil Rights and Social Justice.

Additionally, because of how impressed I was with him as a legal researcher, oral advocate, and leader, I asked Chris to work with me coaching this past year's BLSA mock trial and undergraduate mock trial teams (both of which I coach). Chris did an outstanding job with both teams while also carrying a demanding academic load, working on his note, and serving in regional BLSA leadership (all while navigating the challenges of Covid-19). I don't know how he did it all, but I do know that my competition teams would not have experienced the success they experienced without his sharp insights into the law and facts that applied to the problems, the intellectual horsepower he deployed when engaging the problems, and his excellent trial advocacy and coaching skills. I should also note that the team members all loved Chris – he is simply wonderful to be around.

On a purely personal note, I have found Chris to be a truly delightful young colleague. He is warm-hearted and generous. He is extremely reliable and unfailingly dedicated to the commitments he takes on. He holds himself to the highest performance standards. He is patient, diplomatic, and extremely thoughtful. He is unfailingly kind, and displays tremendous integrity. Over the course of the two years we have worked together, he has demonstrated a level of maturity and poise that has led me to trust and rely upon him completely. I am certain that he will bring much to your chambers.

I would welcome the opportunity to talk with you regarding Chris, and I encourage you to contact me with any questions you may have.

Very truly yours,

Professor C. Elizabeth Belmont

Elizabeth Belmont - belmontb@wlu.edu



DANIEL FRYER  
Senior Research Scholar

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June 22, 2021

Dear Your Honor:

I am writing in support of Christopher Watts (Chris), a law student at Washington and Lee law school who I met last summer while I was a judicial law clerk for Chief Judge Roger L. Gregory of the United States Court of Appeals for the Fourth Circuit. As a summer intern, Chris demonstrated a capacity to provide skillful research, draft memoranda for important court cases, and articulate the potential consequences of different rulings. I believe that he would make a very good law clerk.

Chris started his internship at the beginning of the summer of 2020. From the outset, he impressed me with his ability to understand complex legal issues and offer his opinion on the decision that should be reached. Demonstrating an ability to provide a generous interpretation of opposing parties' briefs, Chris was able to present the merits of each side in their strongest light. At times, he was also able to offer strong arguments for a decision that were not presented by the litigants. Chris displayed a skillful capacity for research that would be of great use as a law clerk.

In addition to his exceptional legal research skills, Chris is also a hard worker. He often worked late but, more than that, he used his time in chambers to learn areas of law that he had not yet been exposed to. When Chris did not know much about the legal issues in a case, he would put in extra work to quickly increase his knowledge by reading hornbooks, law review articles, and other legal texts. This propensity for hard work made Chris a very helpful intern and gave me confidence that I could rely on him.

All of that is about Chris *then*, and of course you are more interested in Chris *now*. Since last summer, I have kept in contact with Chris, who continues to thrive at Washington and Lee law school. He was recently selected as Editor-in-Chief of the Washington and Lee Journal of Civil Rights and Social Justice; his student Note was selected for publication; he won his law school's Negotiations Competition; and he placed third in the Mid Atlantic Black Law Student Association Constance Baker Motley Mock Trial Competition. I have great confidence that Chris is becoming a better lawyer each day, and he will be a very skilled lawyer when it comes time to begin his clerkship.

In addition to the above, Chris is just an overall pleasant person to know. He aspires to be a skilled lawyer, but also a great citizen who provides advocacy for those who cannot advocate for themselves. His creativity, generosity, and diligence will make him a pleasure to have in chambers.

If I can provide any further information, please do not hesitate to contact me.

Respectfully submitted,  
Daniel Fryer  
(cell: 914-885-6627)

IN THE CIRCUIT COURT OF DARROW COUNTY, NITA

JESSE MACINTYRE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. C 1234
	)	
ROSS EASTERFIELD,	)	
	)	
Defendant.	)	

**Plaintiff’s Motion in Limine Seeking the Admission of the Testimony of Dr. Janet Jones**

The plaintiff, Jesse Macintyre (“Macintyre”), respectfully moves in limine to admit the expert testimony of Dr. Janet Jones (“Dr. Jones”) regarding the calculation of hedonic damages. Dr. Jones’ testimony satisfies Rule 702 of the Federal Rules of Evidence because:

- A. Dr. Jones’ specialized knowledge will help the trier of fact understand and calculate hedonic damages;
- B. Dr. Jones testimony is based on sufficient facts or data
- C. Dr. Jones testimony is the product of reliable principles and methods; and
- D. Dr. Jones has reliably applied the principles and methods to the facts of the case.

Because all four prongs of Rule 702 are met by a preponderance of evidence, Dr. Jones’ testimony should be admitted.

## **I. Dr. Jones is an Expert with Specialized Knowledge of Hedonic**

### **Damages that will Assist the Jury in Calculating Damages**

Consistent with the Supreme Court's instruction in *Daubert v. Merrell Dow*

*Pharmaceuticals, Inc.*, and the Advisory Committee's Notes to Rule 702 of the Federal Rules of Evidence (FRE), the admissibility of Dr. Jones' testimony is "governed by the principles of Rule 104(a)." 509 U.S. 579 (1993); Fed. R. Evid. 702 advisory committee's notes. Rule 104(a) allows the trial court to make preliminary determinations on the admissibility of expert testimony using the factors laid out in Rule 702. For Dr. Jones testimony to be admissible, each prong of Rule 702 must be satisfied by a preponderance of evidence.

To begin, Rule 702 only applies to witnesses qualified as experts. *See* Fed. R. Evid. 702. Dr. Jones is qualified as an expert in hedonic damages because of her knowledge, experience, training, and education. *See* Fed. R. Evid. 702. Dr. Jones holds a Ph.D. in Economics from the University of Chicago, currently teaches Analysis of Economic Damages in Litigation at Loyola School of Law and publishes extensively on the topic of hedonic damages. Dr. Jones also runs the Jones Economics Group that regularly conducts economic legal analysis regarding hedonic damages.

Moreover, as Rule 702(a) requires, Dr. Jones' specialized knowledge will help the trier of fact understand and calculate hedonic damages. Hedonic damages are not something the average person would be able to determine intelligently without assistance. The Advisory Committee

Notes to Rule 702 states, that is exactly when expert testimony is needed. *See* Fed. R. Evid. 702 advisory committee's notes. Furthermore, expert testimony regarding hedonic damages has been permitted to assist the jury in previous cases. In *Banks v. Sunrise Hosp*, for example, the Nevada Supreme Court allowed an expert to use the Willingness to Pay ("WTP") method to help the jury calculate hedonic damages. *See Banks v. Sunrise Hosp* 20 Nev. 822 (2004). Here, Dr. Jones' testimony is particularly necessary because the calculation of hedonic damages is still unresolved—and without Dr. Jones' testimony the jury will be unable to *accurately* determine this fact of issue.

## **II. Dr Jones' Testimony is Based on Sufficient Facts and Data.**

As Rule 702(b) requires, Dr. Jones testimony is based on sufficient facts and data. Dr. Jones grounds her testimony in her own research, which includes over 75 self-authored publications, and three studies she did not author. The studies Dr. Jones did not author can be broken down into two major models: consumer safety behavior and individual avoidance. Based on these models, Dr. Jones estimated the average value of a generic life to be 4.4 million dollars (54,000 dollars a year). Dr. Jones then interviewed Macintyre and applied the loss of the pleasure of life ("LPL") scale to determine hedonic damages. In particular, the interview touched on the impact of the alleged defamatory statements, which allowed Dr. Jones to accurately calculate loss of life quality percentages. Here, Dr. Jones' testimony will be based on abundant facts and data. Because Dr. Jones based her testimony on sufficient facts and data, Rule 702(b) is satisfied.

### III. Dr. Jones' Testimony is the Product of Reliable Principles and Methods

As 703(c) requires, Dr. Jones' testimony is the product of reliable principles and methods. *Daubert* governs the reliability of expert testimony setting forth a non-exclusive checklist that is used to assess reliability. These specific factors include:

(1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *See generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579.

According to *Daubert*, no one factor in the non-exclusive list should be considered dispositive, and instead the entire list should be viewed holistically. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993).

When applying these holistic factors to the case at hand, the balance of factors overwhelmingly supports the conclusion that the testimony is reliable. First, Dr. Jones utilizes the WTP and LPL scale to determine hedonic damages, and both of these methods can be tested and challenged in an objective sense. By relying on economic models to reach her conclusions, Dr. Jones conducted an objective assessment on the value of Macintyre's life that can be replicated and performed by other experts in the field. Dr. Jones testimony includes the entire process of calculating damages and explicitly states the economic models or theories she relied

upon. Because Dr. Jones relied on a well-tested theory, her testimony satisfies the first *Daubert* factor.

Secondly, WTP has been subject to extensive peer review and publication. Dr. Jones herself has been published over 75 times on the topic of hedonic damages, and the studies she relied upon were also published in peer reviewed academic journals. Not only has WTP been published on, it has also been held admissible in several courts which shows the reliability of the methodology. *See Banks v. Sunrise Hosp* 20 Nev. 822 (2004); *Lewis V. Alfa Laval Separation, Inc.*, 128 Ohio App.3d 200 (1998). The first two *Daubert* factors heavily favor the admission of Dr. Jones' testimony, despite the other three not being as pronounced. If opposing counsel has concerns with any of the *Daubert* factors, they are more than welcome to explore each factor on cross examination, through an expert of their own or with a limiting instruction. *See Fed. R. Evid. 702* advisory committee's notes (allowing expert testimony to be regularly admitted because of the opposing counsel's ability to cross examine, hire their own expert or ask for a limiting instruction).

Further, Dr. Jones adequately accounted for other explanations in her testimony. The Advisory Committee Notes to 702 list alternative explanations as another relevant factor for courts to consider on top of the *Daubert* factors. In Dr. Jones' deposition she acknowledged that "consumer-purchase studies upon which she relies do not take into account factors other than safety and that there are 'countless' other factors that might prompt a consumer to buy a product which has a safety feature" as well as "incentives other than salary—such as talent requirements, hours, and a particular passion one may have for a certain type of work—would also affect an individual's decision to accept higher-risk employment." Dep. At 7. These admissions in Dr. Jones deposition do not run afoul of the Advisory Committee Notes and in fact bolsters the

strength of her testimony. Admitting that the WTP approach doesn't operate in a vacuum lends towards the credibility and reliability of the methodology because it shows Dr. Jones took other factors into account when making her conclusions. It would be scientifically unsound, as well as unethical, if she attributed the sole cause of these tests to safety and salary because other factors are always at play— humans cannot be so easily quantified. Moreover, Dr. Jones admission of these outside factors shows she was cognizant of their possible detrimental effect and took them into account in this case. Dr. Jones adequately accounted for other explanations when employing the WTP approach, therefore her testimony is the product of reliable principles and methods.

#### **IV. Dr. Jones Reliably Applied the Principles and Methods to the Facts of this Case**

Dr. Jones reliably applied the WTP and LPL methods to Macintyre in this case. After calculating that the generic human life in 2020 is worth 54,000 dollars, Dr. Jones interviewed Macintyre about the impact of the defamatory statements on her life in four categories. She then asked Macintyre how much her quality of life had diminished since the defamatory statements were made. After doing so, Dr. Jones also interviewed Macintyre's psychiatrist who corroborated Macintyre's claims through medical diagnosis. According to the psychiatrist, dysphoria, depression, and anxiety all reduce the quality of Macintyre's life. Dr. Jones then applied the LPL calculations directly to the Macintyre's life and is fully prepared to present her findings to the jury. The principles and methods of WTP and LPL were properly applied to this case.

Lastly, FRE 403 does not bar Dr. Jones testimony—and, instead, strengthens the case for the testimony's admissibility. Opposing counsel argues that Dr. Jones testimony will only serve to confuse the jury and claim valuing the generic human life at 4.4 million will lead to an unduly

high jury award. Opp’n Br. At 6. But that argument only underscores the importance of the expert testimony because only with Dr. Jones testimony will the jury be able accurately and intelligently calculate the hedonic damages. Dr. Jones will clearly and succinctly explain what hedonic damages are, how they are calculated in this case, and then will allow the jury to come to their own conclusion. Furthermore, while the generic life is valued in the millions, the percentages Dr. Jones will present to the jury effectively puts a cap on the amount of damages Macintyre can recover. At the highest percentage, 33 percent loss in quality of life, Macintyre would only be entitled to 59,400 dollars. Without Dr. Jones’ specialized knowledge and the accompanying clarifying testimony, the jury will be confused, mislead, and unable to calculate reasonable hedonic damages. Dr. Jones testimony satisfies every requirement for admissibility and as the Advisory Committee notes, “the rejection of expert testimony is the exception rather than the rule.” *See* Fed. R. Evid. 702 advisory committee’s notes. The circumstances here compels admission of the testimony.

### **CONCLUSION**

Macintyre respectfully requests that the Court grant the Motion In Limine and admit the testimony of Dr. Janet Jones.

Respectfully submitted,

By:                     /s/                    

Chris Watts

Plaintiff Counsel

Phone: 478-365-7134

Email: watts.c22@law.wlu.edu

*This writing sample is an excerpt from the analysis section of my note, "Senseless Sentencing: The Uneven Application of the Career Offender Guideline," which will be published this winter in the Washington and Lee Journal of Civil Rights and Social Justice.*

### *III. An Explanation and Critique of Each Argument in the Circuit Split over the definition of Controlled Substance in 4B1.2*

#### *A. Where Each Circuit Stands*

Federal appellate courts (“Circuits”) are currently split on the definition of “controlled substance” in the Sentencing Guidelines.<sup>1</sup> The Second, Fifth, Eighth, Ninth, and possibly Tenth Circuits have defined “controlled substance” using solely the drugs listed in the federal Controlled Substance Act (“CSA”).<sup>2</sup> On the other side of the split are the Fourth, Seventh, and possibly the Sixth and Eleventh Circuits, which have defined “controlled substance” using federal or state law.<sup>3</sup> Understanding the reasoning behind each Circuit’s position will shed light on the solution to the problem.<sup>4</sup> The arguments for and against federally defining “controlled substance” can be broken down into four categories: (1) 4B1.2(b)’s plain meaning; (2) the *Jerome* Presumption; (3) the lack of internal cross referencing; and (4) the dependence on state law in violation of *Taylor v. United States*.<sup>5</sup>

1. See *United States v. Ward*, 972 F.3d 364, 375 (4th Cir. 2020) (splitting from the other circuits).

2. See *United States v. Townsend*, 897 F.3d 66, 68 (2d Cir. 2018) (finding that the term “controlled substance” in § 4B1.2(b) refers exclusively to those substances in the CSA); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015) (agreeing with the Ninth Circuit and stating that “controlled substance” refers to substances listed in the federal Controlled Substance Act); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011) (using federally defined “controlled substance” when applying the categorical approach); *United States v. Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012) (holding that “controlled substance” means drugs listed in the federal Controlled Substance Act); *United States v. Abdeljawad*, 794 F. App’x 745, 748 (10th Cir. 2019) (nonprecedential) (signaling agreement with the Ninth Circuit in federally defining “controlled substance”); see also *United States v. Walker*, 858 F.3d 196, 200 n.4 (4th Cir. 2017) (noting that “drug trafficking offense” under U.S. SENT’G GUIDELINES MANUAL § 2L1.2 (U.S. SENT’G COMM’N 2018) is “substantively identical” to U.S. SENT’G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT’G COMM’N 2018)).

3. See *Ward*, 972 F.3d at 372 (defining “controlled substance” using federal or state law); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (same); *United States v. Peraza*, 754 F. App’x 908, 910 (11th Cir. 2018) (nonprecedential) (same); *United States v. Smith*, 681 F. App’x 483, 488 (6th Cir. 2017) (nonprecedential) (same).

4. See Julian W. Smith, Note, *Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law*, 16 SUFFOLK J. OF TRIAL & APP. ADVOC. 79, 93 (2011) (“[C]ourts may also look to other circuit courts to help their analyses of interpretation. . .”).

5. See *Taylor v. United States*, 495 U.S. 575, 602 (1990) (holding that the term “burglary” has a definition independent from state law).

### 1. *The Fourth Circuit's Plain Meaning Framework*

Because the Supreme Court has instructed that the starting point for statutory interpretation is the plain meaning of the statute, the analysis begins with the Fourth Circuit's position.<sup>6</sup> In *United States v. Ward*,<sup>7</sup> the Fourth Circuit employed a plain meaning framework to define "controlled substance."<sup>8</sup> A plain meaning analysis "[assumes] that the ordinary meaning of the statutory language accurately expresses the legislative purpose."<sup>9</sup> Turning to the plain meaning of 4B1.2(b), the provision reads: "[t]he term controlled substance offense means an offense under federal or state law."<sup>10</sup> Below, in *Ward*, the Fourth Circuit meticulously analyzed the language of 4B1.2(b) to define "controlled substance":

First, we note that only an "offense under federal or state law" may trigger the enhancement. An "offense" is, of course, "a breach of law." The noun, "offense," is then modified by a prepositional phrase: "under federal or state law." The preposition "under" means "[b]eneath the rule or domination of; subject to." So to satisfy the ordinary meaning of "offense," there must be a violation or crime "subject to" either "federal or state law."<sup>11</sup>

In interpreting the provision, the court relied heavily on the use of dictionaries to find the ordinary meaning of the words.<sup>12</sup> The court ultimately found federal and state "controlled substance offenses" to fall within the language of the provision.<sup>13</sup>

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6. See *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)) (stating that courts should begin their analysis with the text of the statute).

7. See *United States v. Ward*, 972 F.3d 364, 371 (4th Cir. 2020) (finding that the defendant's prior convictions categorically qualify as "controlled substance offenses").

8. See *id.* at 371–72 (defining "controlled substance" as any offense arising under federal or state law).

9. See *Marx*, 568 U.S. at 376 (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)) (internal quotations omitted).

10. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2018) (internal citations omitted).

11. *Ward*, 972 F.3d at 370 (internal citations omitted).

12. See *id.* at 380 (Gregory, C.J., concurring) (taking issue with the majority's use of dictionaries).

13. See *id.* at 372 (majority opinion) (stating a predicate offense can arise under federal or state law).

## 2. The Second Circuit's Usage of the Jerome Presumption

In *United States v. Townsend*,<sup>14</sup> the Second Circuit used the *Jerome* Presumption to define the phrase “controlled substance” in 4B1.2(b).<sup>15</sup> The *Jerome* Presumption is a general rule that states that the application of federal law does not depend on state law unless Congress plainly indicates otherwise.<sup>16</sup> As the Second Circuit noted, the only reason the *Jerome* Presumption and other methods of interpretation are applicable is because the Sentencing Guidelines are ambiguous in 4B1.2(b).<sup>17</sup> Even though the Sentencing Guidelines are not federal statutes found in the United States Code, they are given the force of law and so the presumption is applicable.<sup>18</sup>

The Second Circuit applied the *Jerome* Presumption to 4B1.2(b) and found that the term “controlled substance” refers solely to those substances listed in the CSA.<sup>19</sup> The court reasoned that “federal law is the interpretive anchor to resolve the ambiguity at issue.”<sup>20</sup> The court further stated that allowing state law to control would leave the Sentencing Guidelines up to each individual state, defeating the entire point of the categorical approach.<sup>21</sup> The Seventh Circuit disagreed.<sup>22</sup>

14. See *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018) (holding that “controlled substance refers solely to those substances listed in the CSA).

15. See *id.* at 71 (using the *Jerome* Presumption to resolve the ambiguity in the provision).

16. *Jerome v. United States*, 318 U.S. 101, 104 (1943).

17. See *Townsend*, 897 F.3d at 69 (“If the Guidelines are clear, there is little more to do; if they are ambiguous, however, the courts have crafted an interpretive scheme that honors our federal sentencing system while preserving the fairness owed to the defendant.”).

18. See *United States v. Kirvan*, 86 F.3d 309, 311 (2d Cir. 1996) (stating that the Guidelines have the same level of authority as federal statutes).

19. See *Townsend*, 897 F.3d at 71 (using the *Jerome* Presumption to define “controlled substance” in U.S. SENT’G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT’G COMM’N 2018)).

20. *Id.*

21. See *id.* (stating that allowing state law to control would defeat the purpose of the categorical approach).

22. See *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (rejecting the Second Circuit’s position).

### 3. The Seventh Circuit's Issue with the Lack of Internal Cross References in 4B1.2

In *United States v. Ruth*,<sup>23</sup> the Seventh Circuit directly addressed the Second Circuit's position in *Townsend* and rejected their usage of the *Jerome* Presumption, finding that 4B1.2(b) can refer to substances not listed in the CSA.<sup>24</sup> On top of taking a similar approach to the Fourth Circuit in their reasoning, utilizing the plain meaning of 4B1.2(b) to come to their conclusion, the court also relied on the lack of internal cross references in the provision.<sup>25</sup> To the Seventh Circuit, this was the “fatal flaw” in limiting the term “controlled substance” to only those substances listed in the CSA.<sup>26</sup> As the court recognized, the Sentencing Commission has the ability to cross reference or directly incorporate federal statutory definitions when it wants to.<sup>27</sup> For example, if the Sentencing Commission wanted the term “controlled substance” to refer solely to those substances listed in the CSA, it could have incorporated that provision by reference into 4B1.2(b).<sup>28</sup> According to proponents of the *Jerome* Presumption, this is a significant omission that lends merit to the argument that convictions involving substances not listed in the CSA are not sufficient to serve as predicate offenses for sentencing purposes.<sup>29</sup>

In the same definitional section of the career offender guideline, the Commission defined “crime of violence” by incorporating 26 U.S.C. § 5845(a) and 18 U.S.C. § 841(c).<sup>30</sup> Below is both 4B1.2(a)(2) and 4B1.2(b):

23. See *id.* (finding that the defendant's Illinois drug conviction was a predicate offense under U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018)).

24. See *id.* (stating that U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018) refers both to federal and to state law).

25. See *id.* at 652 (noting the lack of internal cross-referencing in U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018)).

26. *Id.* at 651.

27. See *id.* (taking the omission of incorporating the CSA as dispositive).

28. See *id.* (showing the ease in which the Commission could have federally defined “controlled substance”).

29. See *id.* (showing that the lack of cross-referencing means state law can control).

30. See U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2018) (incorporating federal statutes into the definition section).

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).<sup>31</sup>

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.<sup>32</sup>

The close proximity between “crime of violence,” which incorporates two federal statutes, and “controlled substance,” which lacks any internal cross referencing, strengthens the case for substances not listed in the CSA being able to act as predicate offenses.<sup>33</sup> Furthermore, when the Sentencing Guidelines were first introduced in 1985, the Sentencing Commission did incorporate the CSA into 4B1.2(b).<sup>34</sup> Within a few years, the Sentencing Commission substantively amended the text of the provision to what it reads today, with no incorporation or cross referencing.<sup>35</sup> The lack of cross referencing is persuasive, but is directly at odds with the Supreme Court’s decision in *Taylor v. United States*.<sup>36</sup>

#### 4. How the Supreme Court’s Rationale in *Taylor v. United States* Aids in Interpretation

In *Taylor*, the Supreme Court was tasked with defining the word “burglary” in 8 U.S.C. § 924(e).<sup>37</sup> In defining “burglary”, the Court had to grapple with using individual state

31. *Id.* § 4B1.2(a)(2).

32. *Id.* § 4B1.2(b).

33. *See* *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (noting how close “controlled substance” was to a definition that was cross-referenced).

34. *See id.* (showing that the Commission has incorporated the CSA previously).

35. *See id.* (comparing the previous version of the provision with the current version).

36. *See Taylor v. United States*, 495 U.S. 575 (1990).

37. *See id.* at 599 (defining the word burglary).

definitions or defining the word in a federal context independent of state law.<sup>38</sup> Ultimately, the Court chose to define “burglary” independent of state law, in spite of the enhancement not expressly defining burglary.<sup>39</sup> The Supreme Court reasoned that Congress could not have possibly intended the definition of burglary to depend on state law and stressed the importance of a uniform definition of “burglary” separate from the varying states’ criminal codes.<sup>40</sup>

The decision in *Taylor* created the categorical approach.<sup>41</sup> To determine whether a defendant’s previous state law convictions are predicate offenses for purposes of the career offender guideline, courts employ the categorical approach.<sup>42</sup> Initially, the categorical approach was used for violent felonies in the Armed Career Criminal Act, but “[a]ll of the circuits have held that the same categorical approach applies to the [Sentencing] [G]uidelines.”<sup>43</sup> The categorical approach matches the “statutory elements of the prior conviction” with the “generic offense” in the Sentencing Guidelines.<sup>44</sup>

Several circuits have adopted the reasoning in *Taylor* that created the categorical approach when defining “controlled substance.”<sup>45</sup> The reasoning in *Taylor* mirrors that of the

38. See *id.* (showing the difficulties of applying the varying state law definitions of burglary).

39. See *id.* at 602 (creating the categorical approach).

40. See *id.* at 592 (reasoning that Congress could not have intended to let various state laws serve as definitions).

41. See *id.* at 602 (creating the categorical approach).

42. See *id.* (making courts apply the categorical approach).

43. HAINES ET AL., *supra* note **Error! Bookmark not defined.**, at 1456 (internal quotations omitted).

44. *Id.*

45. See *United States v. Townsend*, 897 F.3d 66, 68 (2d Cir. 2018) (holding that the term “controlled substance” in U.S. SENT’G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT’G COMM’N 2018) refers exclusively to those substances in the CSA); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015) (agreeing with the Ninth Circuit and stating that “controlled substance” refers to substances listed in the federal Controlled Substance Act); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011) (using federally defined “controlled substance” when applying the categorical approach); *United States v. Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012) (holding that “controlled substance” means drugs listed in the federal Controlled Substance Act); *United States v. Abdeljawad*, 794 F. App’x 745, 748 (10th Cir. 2019) (nonprecedential) (signaling agreement with the Ninth Circuit in federally defining “controlled substance”); see also *United States v. Walker*, 858 F.3d 196, 200 n.4 (4th Cir. 2017) (noting that “drug trafficking offense” under § 2L1.2 is “substantively identical” to § 4B1.2(b)).

Sentencing Guidelines themselves—uniformity.<sup>46</sup> To quote *Taylor*, “[i]t seems to us to be implausible that Congress intended the meaning of “[controlled substance]” for purposes of [4B1.2(b)] to depend on the definition adopted by the state of conviction” and “[w]e think that [“controlled substance”] in [4B1.2(b)] must have some uniform definition independent of the labels employed by the various states’ criminal codes.”<sup>47</sup> When confronting this exact issue, Chief Judge Gregory of the Fourth Circuit stated: “[s]omething went wrong here. Rather than follow the rationale of the Supreme Court, the majority adopts the very approach *Taylor* addressed and rejected.”<sup>48</sup> Allowing standalone state law to act as predicate offenses would be in direct conflict with the reasoning set forth in *Taylor*.<sup>49</sup>

## *B. Critiquing the Fourth and Seventh Circuit’s Positions*

### *1. The Issue with the Fourth Circuit’s Interpretation*

While both the Fourth and Seventh Circuit’s arguments are persuasive, they possess fatal flaws.<sup>50</sup> Beginning with the Fourth Circuit, a plain meaning analysis poses several substantive issues.<sup>51</sup> The issue with adopting the plain meaning of 4B1.2(b) is that the phrase “controlled substance offense” lacks an ordinary meaning, because the word “controlled” has a technical definition and is a term of art.<sup>52</sup> Justice Scalia, one of the largest proponents of

46. See U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT’G COMM’N 2018) (showing that the goal of the Guidelines is reasonable uniformity in sentencing).

47. *Taylor v. United States*, 495 U.S. 575, 590, 592 (1990).

48. *United States v. Ward*, 972 F.3d 364, 384 (4th Cir. 2020) (Gregory, C.J., concurring).

49. See *Taylor*, 495 U.S. at 592 (requiring uniformity in federal law).

50. See *Ward*, 972 F.3d at 378 (Gregory, C.J., concurring) (“This is a mistake.”); see also U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS app. A-9 (U.S. SENT’G COMM’N 2016) (explaining why § 4B1.2 is not cross-referenced).

51. See *Ward*, 972 F.3d at 378 (Gregory, C.J., concurring) (reasoning that the majority’s plain meaning approach is flawed).

52. See *Gonzales v. Oregon*, 546 U.S. 243, 259 (2006) (“Control is a term of art in the [Controlled Substances Act].”).

textualism, only applied the plain meaning framework to non-technical words.<sup>53</sup> The word “counterfeit” is an example of a non-technical word that has a plain meaning because any ordinary person reading that word would understand it to mean fake.<sup>54</sup> Unlike “counterfeit,” the word “controlled” lacks such an ordinary reading and cannot stand on its own without context.<sup>55</sup> The nature of the word “controlled” altogether precludes a plain meaning analysis.<sup>56</sup> Along with being a word lacking ordinary meaning, “controlled” is also a passive past participle, which begs the question—controlled by whom?<sup>57</sup> Compare the Fourth Circuit’s analysis with the Second Circuit’s below:

Although a “controlled substance offense” includes an *offense* “under federal or state law,” that does not also mean that the *substance* at issue may be controlled under federal or state law. To include substances controlled under only state law, the definition should read “. . . a controlled substance *under federal or state law*.” But it does not. It may be tempting to transitively apply the “or state law” modifier from the term “controlled substance offense” to the term “controlled substance.”<sup>58</sup>

The stark contrast between the two Circuits’ interpretations makes it clear that there are several ways to read the text of the provision and, because reasonable minds could differ on which interpretation is correct, the language of 4B1.2(b) is ambiguous.<sup>59</sup>

53. See *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (“In the search for statutory meaning, we give *nontechnical words* and phrases their ordinary meaning.”) (emphasis added).

54. See *United States v. Ward*, 972 F.3d 364, 379 (4th Cir. 2020) (Gregory, C.J., concurring) (showing that counterfeit can be defined as fake).

55. See *id.* (Gregory, C.J., concurring) (highlighting the difference between “counterfeit” and “controlled”); see also *Yates v. United States*, 574 U.S. 528, 538, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (“[A]lthough dictionary definitions of the words ‘tangible’ and ‘object’ bear consideration, they are not dispositive of the meaning of ‘tangible object’ in § 1519.”).

56. See *Ward*, 972 F.3d at 379 (Gregory, C.J., concurring) (“One cannot appeal to any plain meaning of the term ‘controlled’ to resolve this question.”).

57. See *id.* (stating that because of the nature of the word “controlled,” it is unclear to whom the provision refers).

58. *United States v. Townsend*, 897 F.3d 66, 70 (2d Cir. 2018).

59. See *id.* (stating that the language of § 4B1.2(b) is ambiguous).

## 2. How the Commentary to 4B1.2 Can Resolve the Ambiguity in the Provision

The overall purpose of the Sentencing Guidelines, and the commentary accompanying 4B1.2(b), can serve to resolve some of the ambiguity in defining “controlled.”<sup>60</sup> First, the goal of the Sentencing Guidelines is to create “reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”<sup>61</sup> With uniformity in mind, the next step is to look to the commentary.<sup>62</sup> The Supreme Court has held that the commentary accompanying the Sentencing Guidelines is authoritative and binding unless it is plainly erroneous or violates the Constitution.<sup>63</sup> The commentary in 4B1.2(b) reads:

Section 4B1.2 defines “controlled substances offense” to include (1) unlawful possession of a listed chemical in violation of 21 U.S.C. § 841( c) (1); (2) unlawful possession of controlled substances manufacturing equipment in violation of 21 U.S.C. § 843(a)(6); (3) maintenance of a place for facilitating a drug offense in violation of 21 U.S.C. § 856; and (4) use of a communications facility in aid of a drug offense in violation of 21 U.S.C. § 843(b).<sup>64</sup>

While this list is non-exhaustive, it is insightful.<sup>65</sup> The commentary and the main text should read harmoniously.<sup>66</sup> By listing four federal statutes when describing what kind of offenses trigger the enhancement, the Commission implicitly defined “controlled substance” in a federal context.<sup>67</sup> When writing the language of the commentary in 4B1.2(b), the

60. See *United States v. Ward*, 972 F.3d 364, 381–83 (4th Cir. 2020) (Gregory, C.J., concurring) (using both the goal of the Guidelines and the commentary to define “controlled substance offense”).

61. U.S. SENT’G GUIDELINES MANUAL ch. 3, pt. A1 (U.S. SENT’G COMM’N 2018).

62. See *Stinson v. United States*, 508 U.S. 36, 45 (1993) (“[T]he commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied . . .”).

63. See *id.* at 44 (stating that the commentary to the Guidelines is binding on courts).

64. U.S. SENT’G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT’G COMM’N 2018).

65. See *Ward*, 972 F.3d at 379 (Gregory, C.J., concurring) (using the listed statutes in the commentary to help understand the Guidelines).

66. See *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (“The text of 33 U.S.C. § 906(c), standing alone, admits of either interpretation. But ‘our task is to fit, if possible, all parts into a harmonious whole.’”) (internal citation omitted).

67. See *id.* (reasoning that the sections should read harmoniously).

Commission *chose* to only reference federal statutes.<sup>68</sup> If standalone state law could act as a predicate offense then one would expect to see a more inclusive list in the commentary.<sup>69</sup>

The plain meaning of the guideline provision may contradict the purpose of the Sentencing Guidelines and the commentary that supports federally defining “controlled substance” with “or state” being explicitly written into the provision.<sup>70</sup> Unlike “controlled,” which poses its own unique interpretive issues, the phrase “or state” clearly provides for state law offenses.<sup>71</sup> Any reading of the provision that does not allow state law offenses to act as predicate offenses would be an erroneous reading of 4B1.2(b).<sup>72</sup>

In interpreting this phrase, it is already clear that state law can act as a predicate offense, shown by the usage of the categorical approach, so the only real question left is whether *solely* state law can act as a predicate offense.<sup>73</sup> It is important to note that a federal reading of 4B1.2(b) does not raise concerns with “or state” being read out of the provision because, as Chief Judge Gregory notes in *Ward*, federally defining “controlled substance” still allows for state law drug offenses as long as those substances are listed in the CSA.<sup>74</sup> Because the text of the Guidelines are ambiguous, and the commentary does not fully resolve that ambiguity, the Fourth Circuit’s plain meaning analysis is “unnecessary and unjustified.”<sup>75</sup>

68. See U.S. SENT’G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT’G COMM’N 2018) (listing four federal statutes).

69. See *United States v. Ward*, 972 F.3d 364, 379 (4th Cir. 2020) (Gregory, C.J., concurring) (noting that if state law could control, the Commission would likely have included it in the list).

70. See *id.* at 370 (reasoning that “or state” would be read out of § 4B1.2(b) if it was federally defined).

71. See *id.* (noting that the language of the provision allows for state law offenses).

72. See *id.* (rejecting any definition of “controlled substance” that does not include state law).

73. See *Ward*, 972 F.3d at 379 (Gregory, C.J., concurring) (understanding that the categorical approach already allows for certain state law to trigger the enhancement).

74. See *id.* at 383 n.7 (“On my reading, a state law offense could trigger enhancement so long as the substance is one controlled under the federal schedules.”).

75. *Id.* at 375.

### 3. *The Issue with the Seventh Circuit's Lack of Internal Cross-References Argument*

The issue with the Seventh Circuit's analysis in *United States v. Ruth* is that it ignores the Commission's explicit explanation as to why the provision is not internally cross referenced.<sup>76</sup> In a report to Congress about the career offender enhancement, the Commission went over every substantive amendment to 4B1.2.<sup>77</sup>

In 1988, 4B1.2 defined "controlled substance offense" as "an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955(a), 959, and similar offenses."<sup>78</sup> The commentary to 4B1.2 explained that "[c]ontrolled substance offense includes any federal or state offense that is *substantially similar* to any of those listed in subsection (2) of the guideline."<sup>79</sup> In 1989, the Commission removed both the phrase "substantially similar" and the internal cross references in 4B1.2, stating:

With respect to the term "controlled substance offense," the Commission sought a definition that was well-established in legislative history and that had the prospect of cohesive case law development. The Commission concluded that the definition from 18 U.S.C. § 924(e) would be preferable to the previous definition . . . Additionally, practical concerns led the Commission to note that "the listing of offenses by section number will necessitate the continuous review of new drug laws, both in terms of their substantive similarity to those already listed in the guideline and simply in terms of the revised section numbers."<sup>80</sup>

The practical concerns are obvious, as listing every offense applicable to 4B1.2 would create an unworkable definition.<sup>81</sup> Turning to the language of 18 U.S.C. § 924(e), which defines "controlled substance offense," the statute reads:

76. See U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCE app. A-9 (U.S. SENT'G COMM'N 2016) (explaining why the Commission amended § 4B1.2).

77. See *id.* (listing the amendments to U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018) over the years).

78. *Id.* at app. A-6.

79. *Id.* at app. A-7 (internal quotations omitted) (emphasis added).

80. *Id.* at 77.

81. See *id.* (stating that practical concerns led to the amendment).

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.<sup>82</sup>

Not only does this definition provide cross references to the CSA, but it also mirrors the language of the congressional directive set forth in § 994(h).<sup>83</sup> Moreover, the Commission also discussed the deletion of the term “substantially similar” from the provision, noting that while the language was removed, “[t]he 1997 amendment largely restored the effect, if not the wording, of the language that was deleted in 1989.”<sup>84</sup> The reasoning behind amending the career offender guideline, and the Commission’s own explanation, resolves the Seventh Circuit’s issue with the lack of cross references in 4B1.2.

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82. 18 U.S.C. § 924.

83. See 28 U.S.C. § 994(h) (requiring that substances in the CSA be penalized).

84. U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCE app. A-7 (U.S. SENT’G COMM’N 2018).

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## Applicant Education

BA/BS From **University of Michigan-Ann Arbor**  
 Date of BA/BS **May 2021**  
 JD/LLB From **The University of Michigan Law School**  
<http://www.law.umich.edu/currentstudents/careerservices>  
 Date of JD/LLB **May 3, 2024**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **Michigan Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **1L Oral Advocacy Competition**

## Bar Admission

## Prior Judicial Experience

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**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**

Matthew Weiner  
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June 29, 2023

The Honorable Stephanie D. Davis  
U.S. Court of Appeals for the Sixth Circuit  
231 West Lafayette Blvd., Room 1023  
Detroit, MI 48226

Dear Judge Davis:

I am a rising third-year student at the University of Michigan Law School, and I am writing to apply for a clerkship in your chambers for the 2024–2025 term or your next available term. It was a pleasure to meet you on the day of the Campbell Moot Court competition, and I think that I could learn a lot from working in your chambers that will help me be a better lawyer.

Prior to law school, I conducted policy research in the Poverty Solutions research center. My first project was to analyze federal and state benefit programs. This was my introduction to legal research, which I have carried on in classes, as a judicial intern, and through my student Note. These experiences have also sharpened my writing skills, building upon my interest in screenwriting. Lastly, working in the research center, in chambers, and in campus groups like the Campbell Board has allowed me to serve as a member of closely-knit teams. As a part of these teams, I had to balance my time to ensure that I provided my best efforts to each. I have done this my whole life, from playing multiple sports every season as a kid to working three jobs each summer during college. I hope to use these skills to manage the duties of a clerk, which I witnessed first-hand during my summer in Judge Bates' chambers. I believe I am prepared to contribute to life in chambers and to the court's important work.

After interning at a trial court, I am excited to tackle the questions that come before an appellate court. I have gotten experience in law school creating, arguing, and judging appellate issues, and I will get to work on cases in the Sixth Circuit this year through the Federal Appellate Litigation Clinic. Additionally, I have spent practically my entire life in southeast Michigan. My dad's grandparents immigrated to Detroit from eastern Europe and his family has stayed ever since. My parents met at the University of Michigan. After school, my mom worked in Detroit for over a decade. This area has been and always will be my home. I would greatly appreciate the opportunity to serve this community.

I have attached my resume, law school transcript, and two writing samples for your review. Letters of recommendation from the following professors are also attached:

- Professor Barbara McQuade: [bmcquade@umich.edu](mailto:bmcquade@umich.edu), (734) 658-4229
- Professor Kyle Logue: [klogue@umich.edu](mailto:klogue@umich.edu), (734) 936-2207
- Professor Don Herzog: [dherzog@umich.edu](mailto:dherzog@umich.edu), (734) 658-4229

Thank you for your time and consideration.

Respectfully,

Matthew Weiner

## Matthew Weiner

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### EDUCATION

#### UNIVERSITY OF MICHIGAN LAW SCHOOL

*Juris Doctor*

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Expected May 2024

Journal: Michigan Law Review, Articles Editor

Moot Court: Campbell Moot Court Competition, Judge Chair

1L Oral Advocacy Competition, Competitor & Judge

Activities: Sexual Assault and Harassment Law Student Advocacy Service, Policy Chair & Outreach Chair

Federal Appellate Litigation Clinic

First-Year Information Leader

#### UNIVERSITY OF MICHIGAN

Ann Arbor, MI

*Bachelor of Arts* in Public Policy, *with distinction*

May 2021

Honors: James B. Angell Scholar

Sophomore Honors Award with Distinction

Activities: Sexual Assault Prevention & Awareness Center, Outreach Chair

Students Demand Action at the University of Michigan, Speaker

### PUBLICATIONS

Note: *Destined to Deceive: The Need to Regulate Deepfakes with a Foreseeable Harm Standard* (forthcoming, Michigan Law Review Vol. 122)

### EXPERIENCE

#### GIBSON, DUNN & CRUTCHER LLP

Washington, DC

*Summer Associate*

May 2023 – Present

- Prepared arguments about the remedies for unconstitutional agency proceedings in anticipation of appeal
- Advised clients on potential sentences at trial for the purposes of settlement discussions

#### JUDGE JOHN D. BATES, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Washington, D.C.

*Judicial Intern*

May 2022 – July 2022

- Researched and drafted memorandum opinions announcing the resolution of disputes
- Reviewed analogous situations to recommend sentences for charges pertaining to the Capitol insurrection

#### POVERTY SOLUTIONS AT THE UNIVERSITY OF MICHIGAN

Ann Arbor, MI

*Research Assistant*

August 2019 – April 2021

- Analyzed benefit programs for state & federal funding proposals that resulted in changes to Michigan Medicaid asset limits and allowed more people to qualify for coverage
- Conducted literature reviews for potential Detroit water utility innovations and police de-escalation tactics

#### SENATOR GARY PETERS FOR U.S. SENATE

Bingham Farms, MI

*Fundraising & Campaign Finance Intern*

May 2019 – November 2020

- Communicated with prospective donors as a part of a record-breaking campaign fundraising effort
- Collected donation history of supporters and advised staff on interactions with the Senator's constituents

### ADDITIONAL

**Volunteer:** Neighbors Building Brightmoor (2018-2020), K-Gramps (2017-2018)

**Interests:** Water sports, screenwriting, and recreating recipes I've had overseas

Control No: E196786501

Issue Date: 06/01/2023

Page 1

# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Weiner, Matthew

Student#: 78518789



*Paul Robinson*  
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
<b>Fall 2021 (August 30, 2021 To December 17, 2021)</b>								
LAW	510	003	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	A
LAW	530	002	Criminal Law	Barbara McQuade	4.00	4.00	4.00	A
LAW	580	003	Torts	Kyle Logue	4.00	4.00	4.00	A-
LAW	593	009	Legal Practice Skills I	Jessica Lefort	2.00	2.00	2.00	S
LAW	598	009	Legal Pract Writing & Analysis	Jessica Lefort	1.00	1.00	1.00	S
<b>Term Total</b>				<b>GPA: 3.900</b>	<b>15.00</b>	<b>12.00</b>	<b>15.00</b>	
<b>Cumulative Total</b>				<b>GPA: 3.900</b>		<b>12.00</b>	<b>15.00</b>	
<b>Winter 2022 (January 12, 2022 To May 05, 2022)</b>								
LAW	520	003	Contracts	Kristina Daugirdas	4.00	4.00	4.00	A-
LAW	540	003	Introduction to Constitutional Law	Don Herzog	4.00	4.00	4.00	A
LAW	594	009	Legal Practice Skills II	Jessica Lefort	2.00	2.00	2.00	S
LAW	737	001	Higher Education Law	Jack Bernard	4.00	4.00	4.00	B+
<b>Term Total</b>				<b>GPA: 3.666</b>	<b>14.00</b>	<b>12.00</b>	<b>14.00</b>	
<b>Cumulative Total</b>				<b>GPA: 3.783</b>		<b>24.00</b>	<b>29.00</b>	

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Issue Date: 06/01/2023

Page 2

# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Weiner, Matthew

Student#: 78518789



University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Grade
Fall 2022 (August 29, 2022 To December 16, 2022)								
LAW	612	002	Alternative Dispute Resolution	Allyn Kantor	3.00		3.00	P
LAW	641	001	Crim Just. Invest&Police Prac	Eve Primus	4.00	4.00	4.00	B+
LAW	664	002	European Union Law	Daniel Halberstam	3.00	3.00	3.00	A-
LAW	693	001	Jurisdiction and Choice Of Law	Mathias Reimann	4.00	4.00	4.00	B+
LAW	885	008	Mini-Seminar	Chris Walker	1.00		1.00	S
			Lawyering in Washington, DC					
Term Total				GPA: 3.409	15.00	11.00	15.00	
Cumulative Total				GPA: 3.665		35.00	44.00	
Winter 2023 (January 11, 2023 To May 04, 2023)								
LAW	601	001	Administrative Law	Nina Mendelson	4.00	4.00	4.00	A-
LAW	669	002	Evidence	Len Niehoff	4.00	4.00	4.00	B+
LAW	815	001	Public Law Workshop	Julian Davis Mortenson	2.00	2.00	2.00	A-
				Chris Walker				
LAW	854	001	Anti-corruption Law & Practice	Chavi Nana	2.00	2.00	2.00	A-
LAW	886	008	Mini-Seminar II	Chris Walker	0.00		0.00	S
			Lawyering in Washington, DC					
LAW	983	001	Moot Court Board	Joan Larsen	3.00		3.00	S
Term Total				GPA: 3.566	15.00	12.00	15.00	
Cumulative Total				GPA: 3.640		47.00	59.00	

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Page 3

# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Weiner, Matthew

Student#: 78518789



*Paul Robinson*  
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023 (August 28, 2023 To December 15, 2023)								
Elections as of: 06/01/2023								
LAW	429	001	Federal Prosecution & Defense	Leonid Feller	2.00			
LAW	677	001	Federal Courts	Gil Seinfeld	4.00			
LAW	742	001	Film Law	Paul Szyndol	3.00			
LAW	980	334	Advanced Clinical Law	Melissa Salinas	5.00			

End of Transcript  
Total Number of Pages 3

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**MICHIGAN LAW  
UNIVERSITY OF MICHIGAN**  
625 South State Street  
Ann Arbor, Michigan 48109

**Barbara L. McQuade**  
*Professor from Practice*

June 29, 2023

The Honorable Stephanie Davis  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard, Room 1023  
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Matthew Weiner for a clerkship in your chambers. Matt is an exceptionally strong student, a diligent worker, and one of the nicest people you will ever meet. I give him my highest recommendation.

Having spent last summer interning in the chambers of a federal judge in Washington, D.C., Matt has a clear understanding of the role of a law clerk. I have learned in conversations with Matt that he is fascinated by the work of courts, and seeks to contribute to that important process. His strength as a writer will make him a valuable asset to any judge. Matt serves as Articles Editor of the Michigan Law Review and enjoys screenwriting in his spare time. In 2021, in my first-year criminal law class, Matt wrote one of the top exams. I found his analysis to be strong and his writing to be clear, succinct, and persuasive. This summer, Matt will work in the Washington, D.C., office of Gibson, Dunn & Crutcher, where he will no doubt further develop his writing and research skills and gain a deeper understanding of litigation in practice, experiences that will help prepare him for success as a law clerk.

On a personal level, Matt is just a delight. He is an eager learner who seeks out feedback. He is an active member of our law school community, serving as a leader in the Campbell Moot Court Competition, the Sexual Assault and Harassment Law Student Advocacy Service, and the Jewish Law Students Association. In addition, Matt services as a First-Year Information Leader, a mentor for first year law students. There is no one better to help guide new students through their first year of law school than Matt, who brings knowledge and proactive kindness to this role. He is the big brother everyone wishes they had.

I previously served as U.S. Attorney for the Eastern District of Michigan. In that role, I had the opportunity to hire more than 60 lawyers, and Matt has the kinds of qualities that I would look for in a new hire – a strong intellect, an ability to work with others respectfully, and effective communication skills. Matt possesses all of these qualities in abundance, which will make him a tremendous resource as a law clerk.

I know from my own experience as a law clerk that a judge's chambers can be like a family, so it is important to bring in clerks who will get along with others, respect confidences, and perform every task with enthusiasm and excellence. I think Matt is very well suited to succeed in this environment. He will be an able assistant to any judge who hires him as a clerk. He has the intellectual capacity to tackle and solve challenging legal problems, he can express his ideas effectively in writing, and he will be a delightful colleague.

For all of these reasons, I enthusiastically recommend Matthew Weiner for a clerkship in your chambers. Please let me know if I can provide any additional information.

Sincerely,

Barbara L. McQuade

Barbara McQuade - bmcquade@umich.edu - 734-763-3813

UNIVERSITY OF MICHIGAN LAW SCHOOL  
625 South State Street  
Ann Arbor, Michigan 48109

Kyle D. Logue  
Douglas A. Kahn Collegiate Professor of Law

June 29, 2023

The Honorable Stephanie Davis  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard, Room 1023  
Detroit, MI 48226

Dear Judge Davis:

I am writing on behalf of Matthew Weiner, a second-year student at the University of Michigan Law School who is applying for a clerkship in your chambers. I am confident that Matt will be an exceptionally good judicial clerk—the sort of person who can get the work done, on time and to the highest standards, and will get along with everyone in the office.

Matt was a student in my torts class in the fall 2021 term, and, judging from his in-class participation and performance on the exam, he was easily among the two or three best students in the class. What struck me initially about Matt was that he took relatively few notes; rather, he kept his head up and listened to everything that was being said. This meant that, when I called on him (which was very often—this happens to people who are frequently making eye contact with the professor), he was exceptionally good at answering even the most difficult questions. With most students, even the good ones, there is usually a moment or two after being called on when they need to gather themselves; sometimes they ask to have the question repeated. Not Matt. He was ready all the time. In addition, his answers reflected not only an uncanny grasp of the classroom discussion, but also a deep and nuanced understanding of the reading.

His performance on the exam was also exceptional. Law school exams are designed to test not only knowledge of the material, but also the ability generally to write well and argue in a persuasive but balanced way, for a particular legal position, citing the relevant authorities where appropriate and distinguishing the important cases that might seem to apply but don't quite. Also, because of the time constraint I place on the exam (4 hours, in class, closed-book), students have to be able to work well under time pressure, and they have to edit their own writing as they go along. Even for the average Michigan (which means brilliant) Law student, this can be a forbidding challenge. Nevertheless, Matt handled my exam with relative ease. His answers were clearly written, his arguments were cogently made, and the writing was so fluid that I came away with the impression that it was easy for him. (This was not true for the vast majority of his classmates.)

Overall, I consider Matt's analytical and writing abilities to be absolutely first rate. I have no doubt that he can do whatever work you throw at him. What is almost as important, I am confident he will be a pleasure to work with. He grew up in the Midwest, and he has that Midwestern humility and no-nonsense approach. He is quick to offer a smile; he is unfailingly polite to, and respectful of, his classmates and professors. Everyone in your office would enjoy his presence.

As a member of the Michigan Law Review, Matt will obviously get a great deal of additional experience doing basic research, editing, and proofreading. Since Matt did not do any research for me, I cannot speak directly to his research skills, though I suspect he is an excellent researcher. If you want to get more of a sense of that part of his background, you might reach out to Judge Bates, for whom Matt interned last summer.

If there is anything more I can tell you about Matt, feel free to email or call me.

Sincerely yours,

Kyle Logue  
Douglas A. Kahn Collegiate Professor of Law  
T: 734.936.2207  
klogue@umich.edu

Kyle Logue - klogue@umich.edu - 734-936-2207

THE UNIVERSITY OF MICHIGAN  
LAW SCHOOL  
ANN ARBOR, MICHIGAN 48109-1215

DON HERZOG  
Edson R. Sunderland Professor of Law

June 29, 2023

The Honorable Stephanie Davis  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard, Room 1023  
Detroit, MI 48226

Dear Judge Davis:

When you meet Matthew Weiner – and you should – you might at first find him quiet and unassuming. Well, in a way that's right. But don't be misled: he's also remarkably high-powered and devoted to raising his already considerable game. He's quiet, yes, but not the least bit awkward or antisocial or anything like that. And he's the kind of guy who instinctively steps up and deals with problems.

I taught Matthew in 1L constitutional law. He is not the kind of student who has to talk to know that he exists. But he was poised, thoughtful, and offered crisp and compelling answers every time I called on him, whether he'd raised his hand or not. It's not just that he was well prepared, though he sure was. It's that he already had impressive legal skills: reading cases closely, thinking about how to apply their holdings and doctrinal analyses, thinking about how to argue responsibly in hard cases. He was good at both flyspecking tricky passages and thinking more structurally or abstractly about what some area of law – say, commerce clause doctrine — was up to. And he was good at uniting those two. Plenty of other very bright 1Ls can't do that sort of thing yet.

I'd have raised Matthew's grade for first-rate participation, but there was no need. We have blind grading at the school – the exams have code numbers, and I don't learn the matching names until I file provisional grades. I wasn't surprised that Matthew's exam earned a straight A.

He is public-spirited. I don't just mean that he studied policy and has worked on the Hill, though that's true. I mean he steps up and helps out. As a 1L, he served as marshal for the Campbell moot court competition, the school's most prestigious competition. That meant of course keeping time in oral arguments – and losing a fair amount of time of his own. He did it because a call went out for volunteers. He served this year as a member of the board, which designs the problem and runs the competition. So too he pitched in several years for a neighborhood organization back home that cleans up blighted properties. So too he volunteered for an organization that pairs Michigan undergraduates (he did his bachelor's degree here too) with local elementary school students. He is emphatically not the sort of person who likes to ask, what's in it for me? He likes to pitch in and help out.

No surprise, between his considerable smarts and his eagerness to help out, that he was chosen to be articles editor of the law review. That recognition comes from his peers, who like Matthew's professors think he's the real deal.

He sure is. He will be a first-rate clerk.

Best,

Don Herzog

Don Herzog - dherzog@umich.edu - 734-647-4047

**Matthew Weiner**

(734) 680-7835 • [mattdw@umich.edu](mailto:mattdw@umich.edu)  
10835 Fellows Hill Dr., Plymouth, MI 48170

WRITING SAMPLE

I drafted the following writing sample in response to the Campbell Moot Court 2022-2023 Problem. This draft is self-edited: no one else has edited or reviewed the brief. It was written as if the case were at the U.S. Supreme Court, having come up from the imagined “Twelfth Circuit” Court of Appeals. Omitted are the Table of Contents and Table of Authorities.

RESPONDENT

Matthew Weiner

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IN THE

Supreme Court of the United States

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No. 22-0096

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H. B. SUTHERLAND BANK, N.A.,  
*Petitioner,*

v.

CONSUMER FINANCIAL PROTECTION BUREAU,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

---

**BRIEF FOR RESPONDENT**

---

Matthew Weiner  
*Counsel of Record*

RESPONDENT

Matthew Weiner

**STATEMENT OF THE CASE****I. INTRODUCTION**

Consumer Financial Protection Bureau (“CFPB”), Respondent, brought an adjudication proceeding against H.B. Sutherland Bank, N.A. (“Sutherland”), Petitioner, for violating multiple provisions of the Consumer Financial Protection Act (“CFPA”). At the conclusion of this agency adjudication, the CFPB determined that Sutherland had engaged in unfair, deceptive, or abusive acts or practices against consumers by enrolling its customers in an overdraft-protection service without their consent that led to millions of dollars of charges and by falsely advertising that its customers would not be charged any mandatory fees. The CFPB assessed civil penalties against Sutherland as a result of its violations of the CFPA.

Sutherland does not challenge the merits of the CFPB’s determination. Rather, Sutherland challenges the result of the CFPB adjudication on two separate grounds: first, its Seventh Amendment right to a jury was denied in this administrative adjudication; secondly, the role of an Administrative Law Judge (“ALJ”) in overseeing the adjudication and recommending civil penalties against Sutherland violated the “Take Care” clause of Article II of the Constitution. The Twelfth Circuit held that the proceeding was constitutional. Respondent asks the Court to affirm Twelfth Circuit’s decision.

The CFPA claims brought against Sutherland do not implicate the Seventh Amendment right to a civil jury trial: this guarantee only extends to claims that are “close analogues” to legal claims available at common law at the time of the amendment’s ratification. Furthermore, and dispositive in the Twelfth Circuit’s analysis, these claims fall under the public rights exception to the Seventh Amendment’s guarantees.

The dual-layer for-cause removal structure of ALJs does not contravene the separation of powers or the President’s ability to oversee the CFPB’s functioning. The CFPB ALJ’s

RESPONDENT

Matthew Weiner

determinations are purely advisory; the CFPB Director is ultimately responsible for making all final decisions, and the Director is removable at-will by the President. Furthermore, because the ALJ serves an exclusively adjudicative function, it is necessary to insulate the ALJ from undue political influence.

## II. STATEMENT OF FACTS

Sutherland provides banking services to millions of customers across the country, with more than one million of those customers residing in the State of Hutchins. *H.B. Sutherland Bank, N.A. v. Consumer Fin. Prot. Bureau*, 505 F.4th 1, 1-2 (12th Cir. 2022). The CFPB is responsible for enforcing several statutes that form a complex federal scheme with consumer financial protection at its heart. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2193 (2020) (quoting U.S.C. § 5511(a)). Thus, it is within the ambit of the CFPB’s mandate to oversee Sutherland in its banking practices.

In July 2019, the CFPB brought an adjudicative proceeding against Sutherland for violating the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693(r); the Fair Credit Reporting Act, 15 U.S.C. § 1681b(f); and the CFPA, 12 U.S.C. § 5531. *Sutherland*, 505 F.4th at 3. The charges pertaining to the first two statutes are not at issue: Sutherland only challenges the CFPA claims here. *Id.*

The CFPB alleges that Sutherland “engaged in deceptive acts and practices” in-person and over the phone, which violates the CFPA’s prohibition against “unfair, deceptive, or abusive acts and practices” (“UDAAP”). 12 U.S.C. § 5536(a)(1)(B); *Sutherland*, 505 F.4th at 3-4.

In accordance with the framework set forth by the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 500–596, the CFPB conducted its adjudication of these charges before an ALJ appointed pursuant to 5 U.S.C. § 3105. *Sutherland*, 505 F.4th at 3. The ALJ is insulated from Presidential removal by a “dual-layer for-cause removal structure,” in which (1) the ALJ may only

RESPONDENT

Matthew Weiner

be removed by the Merit Systems Protection Board (“MSPB”) upon a finding of good cause, and (2) the President may only remove members of the MSPB for “inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 7521(a); 5 C.F.R. § 930.211 (2022); 5 U.S.C. § 1202(d).

The ALJ issued a preliminary finding that Sutherland had engaged in unfair, deceptive, or abusive acts and practices by making false statements and misrepresentations, and continuing to make such misrepresentations long after its customers complained about the mandatory fees. *Sutherland*, 505 F.4th at 4. The ALJ recommended that Sutherland be made to pay over \$350,000 in economic damages caused to consumers and over \$4 million into the Consumer Financial Civil Penalty Fund; the ALJ also recommended that the CFPB issue an injunction prohibiting Sutherland from enrolling future customers in its overdraft-protection services. *Id.* Sutherland filed a timely appeal of the ALJ’s determination to the Director. *Id.* In her Final Decision and Order, Director Pierson upheld each of the findings and penalties included in the ALJ’s recommendation. *Id.*

### III. PROCEDURAL HISTORY

In late 2021, Sutherland filed a petition for review with the Twelfth Circuit Court of Appeals—pursuant to 12 U.S.C. § 5563—seeking to set aside the Director’s Final Decision and Order. *Sutherland*, 505 F.4th at 1. Sitting *en banc*, the Court of Appeals denied the petition for review, finding that the CFPB’s choice to enforce federal consumer protection laws through its own adjudication process was lawful. *Id.* Sutherland then filed a petition for writ of certiorari to the Supreme Court, which the Court granted. *Id.*

## DISCUSSION

### I. THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL IS NOT IMPLICATED BY THE CFPA CLAIMS BROUGHT AGAINST SUTHERLAND

The Seventh Amendment guarantees the right to trial by jury in all “[s]uits at common law.” U.S. Const. Amend. VII. Statutory claims may be encompassed by this guarantee if the claim

RESPONDENT

Matthew Weiner

is closely analogous to claims brought in English courts of law at the time the Seventh Amendment was ratified—in 1791. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). Consumer protection claims, and the accompanying remedies levied by the CFPB, arise from a statutory scheme that is entirely distinct from any legal claim at common law prior to the Seventh Amendment’s ratification. *See Sutherland*, 505 F.4th at 7. However, even a finding that a claim is sufficiently analogous to a suit at common law does not necessitate that the Seventh Amendment right to trial by jury always applies. For example, this Court has specifically held that Congress “may effectively supplant” a common-law cause of action with a statutory claim if the action “inheres in[] or lies against[] the Federal Government in its sovereign capacity.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (citing *Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 458 (1977)). Furthermore, there is no guarantee of a jury trial where “Congress creates new statutory ‘public rights,’” and “assigns their adjudication to an administrative agency with which a jury trial would be incompatible.” *Atlas Roofing*, 430 U.S. at 455. Lastly, even “seemingly private right[s]” that are “so closely integrated into a public regulatory scheme” may not qualify for Seventh Amendment protection. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985). Not only do the claims at issue involve the government as a party, they are also closely integrated into the broader statutory scheme. Therefore, *Sutherland*’s Seventh Amendment argument has no merit.

#### **A. UDAAP CLAIMS HAVE NO CLOSE ANALOGUE AT COMMON LAW**

The Seventh Amendment guarantees the right to trial by jury for both common law actions and statutory actions that are closely analogous to claims brought before courts of law at the time of the amendment’s ratification. This test for whether a statutory claim, like the one at bar here, falls under the ambit of the Seventh Amendment has two parts: first, that the claim is sufficiently analogous to a claim at common law in 1791; second, that the claim is one for which a legal

RESPONDENT

Matthew Weiner

remedy, rather than an equitable remedy, is sought. *Tull v. United States*, 481 U.S. 412, 417–18 (1987).

Sutherland argues that UDAAP claims are closely analogous to a fraud claim, which was a cause of action available at the common law. *See Sutherland*, 505 F.4th at 23 (citing 8 James Wm. Moore et al., *Moore’s Federal Practice* § 38.10). However, a central element of common law fraud claims, across jurisdictions, is a finding of intent. 37 Am. Jur. 2d *Fraud and Deceit* § 1 (defining fraud as a “peculiar species of falsity, the [] *intentional* misrepresentation of a material fact made for the purpose of inducing another to rely, and on which the other reasonably relies to his or her detriment”) (emphasis added). To the contrary, UDAAP claims are specifically defined without any scienter requirement. 12 U.S.C. § 5531(c), (d). This critical difference makes evident that UDAAP claims are not sufficiently analogous to the common law intentional tort of fraud as it was understood in 1791. Because this statutory silence does not explicitly *exclude* a scienter requirement, Petitioner argues that it could be interpreted in light of common law principles to *include* one. However, this would be an inappropriate assumption for the following reason: in 1791, equitable fraud claims did not require intent. *Sec. & Exch. Comm’n v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 193 (1963). Therefore, Congress’ decision to omit a scienter requirement should not be ignored, and common law legal fraud should not be substituted in when equitable fraud serves as a much closer analogue. Thus, UDAAP claims are not analogous to a claim that could have been brought in courts of law at the time of the Seventh Amendment’s ratification.

Even if UDAAP claims were considered close analogues of common law fraud, the second consideration at play in *Tull* would still disqualify the claims at bar from the Seventh Amendment guarantee of trial by jury: all three categories of remedies assessed in this case are equitable, rather

RESPONDENT

Matthew Weiner

than legal. First, the injunction prohibiting Sutherland from enrolling future customers in its overdraft-protection program is an equitable remedy. 42 Am. Jur. 2d, *Injunctions* § 13. Secondly, the restitution awarded to victims that suffered harm from Sutherland’s deceptive acts is also an equitable remedy. *See Tull*, 481 U.S. at 424. Lastly, though Sutherland argues that the civil penalties assessed by the CFPB are legal remedies, and recognizably civil penalties typically are considered legal remedies, the structure of the civil penalties at issue here make them decidedly equitable in nature. The penalties assessed by the CFPB are placed into the Consumer Financial Civil Penalty Fund, from which victims of consumer protection violations are reimbursed and “consumer education and financial literacy programs” are funded. 12 U.S.C. § 5497(d)(1)(2). Conversely, civil penalties, growing out of 18<sup>th</sup>-century English fraud suits, were designed as “fines to the king.” 3 William Blackstone, *Commentaries* \*42 (1768). To this day, standard civil penalties are intended to compensate the government for any harm incurred due to the defendant’s actions. *See* Cornell Law School, Civil Penalties, Wex. But the government does not retain the penalties levied against providers via UDAAP claims. Thus, though entitled “civil penalties,” the fines assessed in UDAAP suits share none of these characteristics: rather than remaining in the possession of the Federal Government, these fines are meant to redistribute funds to the victims of deceptive conduct. *Tull*, 481 U.S. at 414

**B. UDAAP CLAIMS FALL UNDER THE PUBLIC RIGHTS EXCEPTION TO THE SEVENTH AMENDMENT**

Even if Sutherland’s argument were accepted, that UDAAP claims are close analogues to common law fraud, the claims at play here would still fall outside the reach of the Seventh Amendment because they fall squarely into the public rights exception. The Court’s precedent demonstrates that Congress can permit agency adjudication, absent a jury, of claims involving public rights without running afoul of the Seventh Amendment. Firstly, the CFPB is suing

RESPONDENT

Matthew Weiner

Sutherland in its sovereign capacity to enforce statutory rights. Moreover, even if the rights at issue in this case were considered entirely private, the public rights doctrine would still apply as UDAAP claims are “closely integrated into a public regulatory scheme.” *Thomas*, 473 U.S. at 594. Additionally, requiring trial by jury for these claims would “go far to dismantle” our consumer protection scheme. *Granfinanciera*, 492 U.S. at 60–63.

**i. THE CFPA IMPLICATES A PUBLIC RIGHT**

Though our understanding of the public rights doctrine has broadened over time, *see Thomas*, 473 U.S. at 586, a quintessential indicator of the existence of a public right is the presence of the Federal Government as a party. *See Stern v. Marshall*, 564 U.S. 462, 490 (2011); *Atlas Roofing*, 430 U.S. at 450 (recognizing a public right when the government “sues in its sovereign capacity to enforce public rights created by statutes”). As this Court noted in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, when the government appears as a litigant, a public right is involved, and the claims may be heard in a non-Article III forum. 59 U.S. (18 How.) 272, 284 (1855). To be sure, this logic may have initially sprung from the notion that, when the government is cast in the role of defendant, it is perfectly reasonable for it to choose the forum because it could simply assert its sovereign immunity and not subject itself to suit at all. However, more recent cases, such as *Granfinanciera*, ostensibly extend this proposition to cases in which the government appears as the plaintiff. 492 U.S. at 65 (Scalia, J., concurring) (collecting such precedents).

In the case at bar, a federal agency—namely, the CFPB—brought suit in its sovereign capacity to enforce statutory rights delineated in the CFPA and to carry out its responsibility of regulating “the offering and provision of consumer financial products or services under the Federal consumer financial laws.” 12 U.S.C. § 5491(a). Though not dispositive, this counsels heavily in favor of considering UDAAP claims to be public rights.

RESPONDENT

Matthew Weiner

The stated purposes of the CFPA are also telling. First, when President Obama proposed creating the CFPB, the bureau’s projected role was to “consolidat[e] in one place responsibilities that had been scattered across government.” Building the CFPB, Consumer Financial Protection Bureau. As opposed to Petitioner’s categorization of the CFPA as merely repackaging private common law rights into an administrative structure, the CFPB is a continuation of public rights long-housed in the government. Additionally, in the way of “new” powers, the CFPB’s responsibilities center on “supervising providers of consumer financial products and services that had not had federal oversight and [] enforcing the consumer protections laws with respect to such providers.” *Id.* This is a far cry from the objective and capability of private rights. Rather, the ability to bring claims like those at bar is necessary for the CFPB to carry out its congressional mandate.

When an agency’s public rights are being vindicated, Congress may designate adjudication to the courts or it may choose another forum for adjudication. *Murray’s Lessee*, 59 U.S. (18 How.) at 284. The Court has explicitly stated that the Seventh Amendment does not prohibit Congress from assigning the “factfinding function and initial adjudication” of public rights to non-Article III administrative hearings. *Atlas Roofing*, 430 U.S. at 450 (finding constitutional a similar claim arising out of Occupational Safety and Health Act). Here, Congress exercised its discretion to assign the adjudication of public rights claim housed in the CFPA to administrative proceedings. Congress had good reason to do so, as expounded on *infra*.

**ii. UDAAP CLAIMS ARE INTEGRAL TO A COMPLEX REGULATORY SCHEME**

Even if it is determined that the UDAAP claims implicate private rights, this case would still fall into the Seventh Amendment’s public rights exception as it has been understood because these claims are “so closely integrated into a public regulatory system.” *Thomas*, 473 U.S. at 593–94. In *Thomas v. Union Carbide*, a group of pesticide manufacturers challenged the

RESPONDENT

Matthew Weiner

constitutionality of EPA’s mandatory, binding arbitration procedure for compensation claims against other manufacturers. *Id.* at 571. Specifically, companies that comply with Federal Insecticide, Fungicide, and Rodenticide Act’s requirements to register a product may be compensated by “follow-on” registrants that seek to replicate the product without having to comply with the registration requirements. *Id.* at 572. On its face, these disputes would appear to involve private rights litigated between two private parties, requiring adjudication in an Article III court. However, this Court held that the claims were public rights, as they were necessary for EPA’s registration system to function properly. *Id.* at 590.

Similar to the compensation claims at issue in *Thomas*, the UDAAP claims against *Sutherland* are necessary for the CFPA to have its intended effect. Consumer protection laws did not exist at the founding. *Sutherland*, 505 F.4th at 10. Rather, much like the public rights identified in *Atlas Roofing*, consumer protection statutes have only arisen in the last century. *Id.*; see generally *Atlas Roofing*, 430 U.S. 442. This statute is an extension of that development, encapsulating novel rights necessary to protect against previously unforeseen wrongs. Here, in response to the 2008 financial crisis, Congress created a complex regulatory scheme and designated the CFPB to counteract deceptive banking practices. To that end, it is necessary for the CFPB to maintain the authority to adjudicate UDAAP claims against violating banks and assess appropriate remedies. If the CFPA did not include this ability within the grasp of the CFPB’s mandate, it is doubtful that many consumers would be able to effectively seek restitution or sufficiently take bad-actors like *Sutherland* to task.

Furthermore, the civil penalties at issue here are an integral component of this regulatory scheme. *Dicta prius*, the objective of the CFPA is to protect consumers from predatory banking practices. In order to accomplish that goal, the civil penalties serve two functions: first, to generally

RESPONDENT

Matthew Weiner

discourage violators from engaging in deceptive practices beyond the disincentive role of enjoining specific practices; and second, to fund both educational initiatives and restitution efforts. Without the civil penalties for UDAAP violations, each of these functions would be harmed; that is precisely why Congress created this structure and, as such, created this public right.

**iii. REQUIRING JURY TRIALS WOULD DELETERIOUSLY IMPACT THE CFPB’S ENFORCEMENT OF UDAAP PROVISIONS**

When the requirement of trial by jury “would be out of place and would go far to dismantle” a statutory right that Congress has established by creating a federal regulatory program, Congress may designate agency adjudication. *Granfinanciera*, 492 U.S. at 34. This designation may be appropriate when trial by jury would “impede swift resolution” of claims, *Granfinanciera*, 492 U.S. at 63, or “substantially interfere with the [agency’s] role in the statutory scheme.” *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

Adjudicating claims brought pursuant to the CFPA requires an understanding of complex statutory language and conduct that is designed to take advantage of consumers—of whom the jury would be composed. The CFPB, and specifically its ALJ, possesses an expertise in this subject matter. Therefore, not only will agency adjudications result in more predictable outcomes, they will also be more efficiently reached. It will be unnecessary to explain the structure and content of the CFPA to the ALJ in each hearing.

Though UDAAP claims may still be brought in Article III courts, funneling *every* UDAAP claim through Article III courts would frustrate the purpose of the CFPA. This is particularly true when considering another way in which agency adjudications are more efficient: rather than each consumer bringing their individual claims against a bank in separate Article III suits, the CFPB can analyze the bank’s conduct and assess appropriate remedies in a single agency proceeding. Resolving these claims quickly—it took less than 16 months from the initiation of proceedings to

RESPONDENT

Matthew Weiner

the Final Decision’s issuance in this case—and decisively is beneficial to all parties and is necessary to achieve the CFPA’s objective. To require each individual claim to be brought in an Article III court would “defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.” *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

Given concerns about efficiency and inexpert results that would arise were UDAAP claims required to be heard in Article III courts, Congress’s decision to provide agency adjudication for these claims was eminently reasonable. It is also eminently constitutional, as UDAAP claims embody public rights that are integral to a complex regulatory scheme and have no close analogue at common law. The Court should uphold the Twelfth Circuit’s ruling that the agency adjudication in question did not violate Sutherland’s Seventh Amendment rights.

## II. THE REMOVAL STRUCTURE FOR THE CFPB’S ALJ DOES NOT VIOLATE THE SEPARATION OF POWERS

The President is constitutionally mandated to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3, cl. 4. This Court has held that, in order to carry out this mandate, the President must retain “the power to appoint[] and remov[e ] executive officers.” *Myers v. United States*, 272 U.S. 56, 164 (1926). The dual-layer for-cause removal restrictions on the CFPB ALJ do not run afoul of this rule, and thus do not violate the separation of powers doctrine. Firstly, ALJs are inferior officers exercising exclusively recommendatory authority. The CFPB Director must choose to adopt the ALJ’s recommendation as its final decision in order for it to take effect. The CFPB director, an executive officer, is directly removable at-will by the President. *See Seila Law*, 140 S. Ct. at 2204. Further, the removal protections for the CFPB ALJ are necessary: to ensure that the ALJ is able to carry out its adjudicative role without prejudice or undue burden, the

RESPONDENT

Matthew Weiner

ALJ must be insulated from political pressure. To call this structure into question is to threaten the integrity of administrative adjudications throughout the Federal Government. The Court should uphold the Twelfth Circuit’s decision that the removal protections for the CFPB ALJ do not impede the constitutional separation of powers.

**A. THE CFPB ALJ EXERCISES ONLY ADJUDICATIVE, RECOMMENDATORY FUNCTIONS**

As noted in *Free Enterprise Fund*, ALJs “perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers.” 561 U.S. at 507 n.10. Though ALJs possess the necessary functions to carry out hearings—admit evidence, issue subpoenas, oversee the course of proceedings—they are not empowered to initiate the adjudicative process nor, *dicta prius*, produce binding decisions. 12 C.F.R. § 1081.104 (2021). Therefore, ALJs are not capable of significant agency-wide policymaking. The CFPB ALJ lacks the authority that prompted the Court in *Seila Law* to conclude that the CFPB Director possesses “potent enforcement power” and thus must be directly removable at-will by the President, *see* 140 S. Ct. at 2193, nor the “substantial executive” power to unilaterally issue binding sanctions that the Public Company Oversight Board that the Court found troublesome in *Free Enterprise Fund*, 561 U.S. at 485. It is for this reason that ALJs are categorized as inferior, rather than executive, officers. *Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044, 2049 (2018). Notably, the Court in *Free Enterprise Fund* explicitly excluded ALJs from its conclusion that dual layer removal restrictions were unconstitutional as presented. 561 U.S. 477, 507 n.10 (2010).

Additionally, the restrictions on the President to remove the CFPB ALJ are appropriate to insulate the ALJ from any “coercive influence” on its investigatory and adjudicative functions. *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630, 691 n.30 (1935) (finding the removal protections for members of the Federal Trade Commission who possessed both quasi-judicial and quasi-legislative functions to be constitutional); *Morrison v. Olson*, 487 U.S. 654, 659 (1988)

RESPONDENT

Matthew Weiner

(finding the removal protections for independent counsel investigating the DOJ who was appointed by a special court and recommended by the Attorney General to be constitutional). In order to ensure that the CFPB ALJ remains impartial and the CFPA's important objectives are effectively pursued, it is necessary not to subject the ALJ to political pressure from whichever party is in power at the time. *Sutherland*, 505 F.4th at 19–21. Dismantling the ALJ's removal protections “would risk transforming administrative independent adjudicators to dependent decisionmakers.” *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring).

**B. THE PRESIDENT MAY REMOVE THE CFPB DIRECTOR AT-WILL AND THUS RETAINS EXECUTIVE AUTHORITY OVER THE CFPB**

Even if it were determined that the CFPB ALJ's purely adjudicative role, lack of policymaking power, and need for insulation from partisan influences did not justify the removal protections presented in this case, there is still no cause for concern that these protections undermine the Take Care clause or the President's executive authority. The President may remove at-will the CFPB Director, who in turn exercises essentially absolute control over the ALJ's adjudicative functions. This structure “protects the President's policy preferences.” *Sutherland*, 505 F.4th at 19.

As discussed above, ALJs' decisions are purely advisory. The CFPB Director is—and was in this case—ultimately empowered to issue the agency's final determination. As she sees fit, the Director may “affirm, adopt, reverse, modify, set aside, or remand” the ALJ's recommendation. 12 C.F.R. § 1081.405(c). Therefore, the Director “maintains full policymaking control over all matters heard within the Bureau's adjudicative structure.” *Sutherland*, 505 F.4th at 19.

Meanwhile, after the Court's decision in *Seila Law*, the CFPB Director is directly removable by the President at-will. 140 S. Ct. 2183. Given the confluence of the CFPB Director's policymaking authority and the President's ability to remove the Director at-will, the President

RESPONDENT

Matthew Weiner

retains functional control over the CFPB. *See Morrison v. Olson*, 487 U.S. at 696 (holding that the President’s authority over the Attorney General, who oversaw independent counsel, satisfied the President’s Article II responsibilities).

### CONCLUSION

The Court should find the adjudication of UDAAP claims before an Administrative Law Judge, who is protected by a dual-layer for-cause removal structure, is constitutional. UDAAP claims do not have a close analogue at common law, they fall under the public rights exception to the Seventh Amendment, and requiring trial by jury for these claims would frustrate Congress’ objective when creating the CFPA. Likewise, the removal protections for ALJs are constitutional, due to their lack of significant executive authority, and necessary to protect the neutrality of agency adjudications. For these reasons, the Court should affirm the Twelfth Circuit’s decision and find for Respondent.

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WRITING SAMPLE

This writing sample is a draft of a Note that I submitted and was selected for publication in the *Michigan Law Review*. The writing and editing of this writing sample are entirely my own. Comments from a fellow student have been incorporated at times throughout the piece. I have included the entire Note, as the background information provided may be necessary to understand throughout. Part I describes the rising threat of politically-oriented deepfakes, as well as current and proposed laws to address it. Part II elucidates what I see as the principal issues with current laws, both as a matter of policy and in terms of constitutionality. Part III contains my proposal, its benefits, and its legal support. The typeface and punctuation used conform to the *Michigan Law Review* submission requirements.

**Destined to Deceive: The Need to Regulate Deepfakes with a Foreseeable Harm Standard****Abstract**

Political campaigns have always attracted a significant amount of attention, and politicians have often been the subjects of controversial -- at times outlandish -- discourse. In the last several years, however, the capacity for falsities to deceive has increased drastically due to the rise of “deepfakes.” Now, practically anyone can make audio-visual media that is both highly believable and highly damaging to a candidate out of thin air. The threat that deepfakes pose to our elections has prompted several states, and Congress, to seek legislative remedies to ensure recourse for victims and hold bad-actors liable. These current attempts at deepfake laws, however, are open to attack from two different loci: first, that these laws unconstitutionally infringe on speakers’ First Amendment rights; and second, that these laws do not adequately protect us from the most harmful deepfakes. This Note proposes a new approach to regulating deepfakes. By applying a “foreseeable harm” standard, which involves a totality of the circumstances test rather than a patchwork system of binary rules, both concerns can be addressed. Not only is a foreseeable harm standard effective, workable, and constitutionally sound, it is also grounded in existing law as a traditional tort law concept. Additionally, support can be found for such a standard in a significant recent Supreme Court decision pertaining to false statements and the First Amendment, *United States v. Alvarez*. Adopting this standard will be necessary to combat the looming threat of politically-oriented deepfakes while respecting the constitutional right to free speech.

## Table of Contents

Introduction.....	3
I. The Problem with Deepfakes and Current Attempts at Solving It.....	5
A. Recent Examples of Politically-Oriented Deepfakes.....	5
B. Existing and Proposed Deepfake Laws.....	11
II. Constitutional Obstacles and Policy Blind Spots of Current Deepfake Laws.....	15
A. Constitutional Footing of Deepfake Laws.....	15
i. Resolved by the Nature of Deepfakes.....	17
a. Counterspeech.....	17
b. “Other Legally Cognizable Harm”.....	20
c. Policing Truth & Chilling True Statements.....	20
d. Satisfying Scrutiny.....	22
ii. Looming Issues.....	25
a. Mens Rea.....	25
b. Context-Blind Restrictions.....	25
c. Discriminatory Enforcement.....	27
B. Shared Features of Existing Laws and Their Blind Spots.....	29
i. Disclaimers.....	29
ii. Subsequent Sharers.....	31
iii. Reasonable Viewer.....	32
III. The Benefits of a Foreseeable Harm Approach.....	33
A. Benefits of Implementing a Foreseeable Harm Approach to Deepfake Regulation...34	
i. Reasonable Viewer.....	34

ii.	Context-Blind Restrictions.....	36
iii.	Mens Rea.....	38
iv.	Subsequent Sharers.....	38
v.	Disclaimers.....	39
vi.	Who and What Are Depicted?.....	40
B.	Support for a Foreseeable Harm Approach.....	42
i.	Justice Breyer’s Concurrence.....	42
ii.	The “Reasonable Person” Standard.....	44
	Conclusion.....	47

## Introduction

In the last several years, the public has been confronted by “deepfakes,” or altered audio-visual media that can make anyone look like they are saying or doing things that they have not. Deepfakes are uniquely dangerous in two specific settings, which have produced some of the most highly publicized and controversial examples. First, “deep learning” technology can be used to create fake pornographic content,<sup>1</sup> often inserting a celebrity or a former romantic partner -- what has been coined “revenge porn.” Second, deepfakes can be employed in efforts to interfere with elections by portraying a candidate or someone affiliated with their campaign in a compromising position.

In response to the recent proliferation of deepfakes, seven states -- California, Georgia, New York, Texas, Virginia, Florida, and Washington -- have adopted laws primarily targeting

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<sup>1</sup> United Nations Institute for Disarmament Research, Unpacking and Managing the Deepfake Phenomenon Part 2, 2021 **Innovations Dialogue: Deepfakes, Trust & Int’l Sec.**, at 23.

the two aforementioned exigent threats.<sup>2</sup> Congress and multiple other states have been unsuccessful in their attempts to address deepfakes to date. None have yet faced challenges, but there is speculation that these laws may violate the First Amendment because they are overbroad to the point of chilling protected speech. Though there are differences in each state's approach to regulating deepfakes, there are several common features which make these laws constitutionally troubling (and ineffective).

Scholars have been quick to offer regulatory and constitutional arguments in support of federal deepfake legislation as it pertains to revenge porn.<sup>3</sup> However, a federal law targeting deepfakes used in furtherance of election interference schemes likely stands on more precarious ground, given the near-sacrosanct position that political discourse holds in our society.<sup>4</sup> Thus, as Congress treads into murky waters, it will be critical to craft a legislative response on sound constitutional footing. Likewise, as the potential for deepfakes to play a significant role in widespread misinformation campaigns increases and solutions for consistently identifying real from altered media remain elusive, we must counter this trend with effective and workable laws across the country.

<sup>2</sup> Korey Clark, 'Deepfakes' Emerging Issue in State Legislatures, **State Net Capitol Journal**, <https://www.lexisnexis.com/en-us/products/state-net/news/2021/06/04/Deepfakes-Emerging-Issue-in-State-Legislatures.page> (last visited May 13, 2023); Tristan Wood, **Legislatures Approves Cyber Terror, Deepfake Bill**, **Florida Politics** (Mar. 8 2022), <https://floridapolitics.com/archives/505471-cyber-terror-deepfake-bill-close-to-legislature-approval/>; Eric Hal Schwartz, **Washington State Passes Law Regulating Deepfakes in Political Ads**, **Voicebot.ai** (May 11, 2023), <https://voicebot.ai/2023/05/11/washington-state-passes-law-regulating-deepfakes-in-political-ads/>.

<sup>3</sup> See, e.g., Rebecca A. Delfino, **Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act**, 88 **Fordham L. Rev.** 887 (2019).

<sup>4</sup> See Lindsey Wilkerson, **Still Waters Run Deep(fakes): The Rising Concerns of "Deepfake" Technology and Its Influence on Democracy and the First Amendment**, 86 **Mo. L. Rev.** 407, 424 (2021).

This Note seeks to highlight the dangers of unrestricted deepfakes and the shortcomings of current deepfake laws in an effort to chart a new path forward for attaching liability. Part I traces the recent proliferation of deepfakes used for political purposes, as well as the proliferation of laws trying to keep pace. Part II examines the constitutional obstacles to, and policy problems with, several common provisions of current deepfake laws. Part III proposes a simplified approach, arguing for a “foreseeable harm” standard for attaching liability to deepfake sharing. As demonstrated, deploying a foreseeable harm standard in this way is not a far cry from current practice: it simply repurposes the “reasonable person” standard from the viewer’s perspective to that of the speaker. Such an adaptation is forecasted in the proposed House bill discussed in Part I, though not to the extent this Note advocates.

## **I. The Problem with Deepfakes and Current Attempts at Solving It**

The threat of misinformation has taken center stage in recent elections, and perhaps the most effective form of misinformation is falsified audiovisual media. Technology to aid the creation of misleading audiovisuals continues to advance, posing an ever-growing threat to the integrity of our elections. This section examines how deepfakes have been deployed in the political realm, along with complications that stand in the way of any solution. Additionally, as a starting point for suggested reforms, this section details current laws targeting political deepfakes.

### **A. Recent Examples of Politically-Oriented Deepfakes**

In 2020, a video of then-Speaker Nancy Pelosi circulated on the internet, in which she appeared to be intoxicated.<sup>5</sup> In this video, the words Pelosi spoke were not altered, but the audio

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<sup>5</sup> Drew Harwell, Doctored Images Have Become a Fact of Life for Political Campaigns. When They’re Disproved, Believers ‘Just Don’t Care.’ **Wash. Post** (Jan. 14, 2022).

itself was tampered with -- slowed down and distorted -- to give the impression that Pelosi was inebriated.<sup>6</sup>

As tensions grew last year in the ongoing armed conflict between Russia and Ukraine, Ukrainian President Volodymyr Zelenskyy became the target of a deepfake campaign.<sup>7</sup> A hacked Ukrainian broadcasting service played a video that seemed to depict Zelenskyy telling Ukrainian soldiers to surrender to Russian forces.<sup>8</sup> Zelenskyy's face was inserted into the video, with his mouth movements made to match the overlaid dialogue.<sup>9</sup>

To demonstrate how far deepfake technology has come, the Massachusetts Institute of Technology's "In Event of Moon Disaster" project released a video of President Richard Nixon announcing to the country that the Apollo 11 mission had failed, leaving the astronauts onboard stranded on the moon.<sup>10</sup> This video created, entirely from scratch, an event that never occurred: "deep learning" technology was used to simulate Nixon's movements and was coupled with AI software to match the synthetic video to the dialogue, which itself was partially created by computer programming.<sup>11</sup>

Among countless other examples that have entered the political conversation in recent years, the above are all instances of "deepfakes."<sup>12</sup> Though definitions of deepfakes differ slightly, they can colloquially be defined as synthetically modified photographs or videos that

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<sup>6</sup> Id.

<sup>7</sup> Bobby Allyn, Deepfake Video of Zelenskyy Could Be 'Tip of the Iceberg' in Info War, Experts Warn, NPR (Mar. 16, 2022).

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Asher Stockler, MIT Deepfake Video 'Nixon Announcing Apollo 11 Disaster' Shows the Power of Disinformation, *Newsweek* (Dec. 13, 2019).

<sup>11</sup> Id.

<sup>12</sup> Increasing Threat of Deepfake Identities, Dep't of Homeland Sec'y, [https://www.dhs.gov/sites/default/files/publications/increasing\\_threats\\_of\\_deepfake\\_identities\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf).

appear to depict events that did not happen in reality.<sup>13</sup> As demonstrated by the examples above, the possibilities of what a deepfake can be made to depict are endless. Within the political realm, a candidate can be inserted somewhere they were not; people and or objects that were not present can be inserted into a video of a candidate; words can be put into a candidate's mouth that they never said; an actual video of a candidate can be tampered with to alter the perception of the candidate's words or actions; or, an entirely fictitious scenario can be created and a candidate can be placed within it.<sup>14</sup>

Of course, lies about politicians are not new to our political landscape, and false depictions of politicians saying or doing damaging things date back to the nineteenth century.<sup>15</sup> However, up until recently, these false depictions were easily sniffed out;<sup>16</sup> in fact, many contemporary deepfakes, referred to as “cheapfakes,” still fail to deceive viewers.<sup>17</sup> Yet, in recent years, deepfake technology has reached new levels of sophistication, making it increasingly hard to detect which images are real and which are not.<sup>18</sup> The above-listed examples have been highly publicized, making their falsity more readily discoverable; however, many

<sup>13</sup> See Dictionary.com, “Deepfake,” <https://www.dictionary.com/browse/deepfake>.

<sup>14</sup> See Shannon Bond, It Takes a Few Dollars and 8 Minutes to Create a Deepfake. And That's Only the Start, **NPR Morning Edition** (Mar. 23, 2023) for further examples.

<sup>15</sup> Political Cartoons Developed Significantly During the Early Nineteenth Century, **First Amend. Museum**; Kareem Gibson, Deepfakes and Involuntary Pornography: Can Our Current Legal Framework Address This Technology?, 66 **Wayne L. Rev.** 259, 281 (2020).

<sup>16</sup> Elaine Kamarck, A Short History of Campaign Dirty Tricks before Twitter and Facebook, **Brookings Inst.** (Jul. 11, 2019). For a discussion of the importance of preserving political cartoons and similar critical speech in relation to a defamation claim brought by a public figure, see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53-55 (1988). Notably, though these caricatured depictions are meant to express specific sentiments about public figures, they do not masquerade themselves as real depictions.

<sup>17</sup> **Dep't of Homeland Sec.**, supra note 12.

<sup>18</sup> See Beth Anne Halgason, Lies That 'Might' Eventually Come True Seem Less Unethical, **Am. Psych. Ass'n** (2022); United Nations Institute for Disarmament Research, supra note 1.

deepfakes will not be widely reported on, leaving individual viewers to decide for themselves what is real without sufficient tools to aid in this decision.<sup>19</sup>

Not only does this dynamic mean that false videos will be believed by some, it also means that real videos will be doubted by some, due to the lingering possibility that anything one sees may have been manipulated.<sup>20</sup> Two concerns that follow are that deepfakes' increasing presence will lead to the de-legitimization of news outlets<sup>21</sup> and that viewers will selectively believe misinformation tailored to their preconceived notions, leading to further entrenchment of their views.<sup>22</sup>

Hand-in-hand with, and perhaps buttressed by, the above-listed concerns with politically-oriented deepfakes is the threat they pose to our elections.<sup>23</sup> A deepfake creator could seek to “damage the reputation of [a candidate], incite a political base, or undermine trust in the election process.”<sup>24</sup> Beyond deceiving voters and impacting their choices at the ballot box, there is also

<sup>19</sup> Thomas Nygren et al., Combatting Visual Fake News with a Professional Fact-Checking Tool in Education in France, Romania, Spain and Sweden, **Information** (2021). Even highly publicized deepfakes are effective, as supporters of the message conveyed will still hold the image indicative of the truth, even after it has been discredited. See Harwell, supra note 5; see also Gerald G. Ashdown, Distorting Democracy: Campaign Lies in the 21<sup>st</sup> Century, 29 **Wm & M. Bill of R. J.** 1097, 1100 (2012) (describing how polarization allows people to insulate themselves from other narratives).

<sup>20</sup> Jack Langa, Deepfakes, Real Consequences: Crafting Legislation to Combat Threats Posed by Deepfakes, 101 **B.U.L. Rev.** 761, 767 (2021).

<sup>21</sup> Jackson Cote, Deepfakes and Fake News Pose a Growing Threat to Democracy, **Experts Warn, Ne. Global News** (Apr. 1, 2022), <https://news.northeastern.edu/2022/04/01/deepfakes-fake-news-threat-democracy/>; Bobby Chesney & Danielle Citron, Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security, 107 **Calif. L. Rev.** 1753, 1784-85 (2019).

<sup>22</sup> Cote, supra note 21; Chesney & Citron, supra note 21, at 1768. This is further expounded upon infra.

<sup>23</sup> Tim Mak & Dina Temple-Raston, Where Are the Deepfakes in This Presidential Election?, **NPR** (Oct. 1, 2020).

<sup>24</sup> **Dep't of Homeland Sec'y**, supra note 12.

the potential for deepfakes to be used to inaccurately shape policy discussions,<sup>25</sup> implanting fake evidence into the popular discourse about any variety of topics and stirring fierce rhetoric. Furthermore, rather than harming candidates indirectly via public opinion, deepfakes could even be used to extort politicians or fraudulently gather information from confidential sources.<sup>26</sup> Though these fears have not been fully realized as of yet, the danger posed by such persuasive misinformation will likely come to bear in future elections given that interfering with the democratic process may be the very aim of their creation.<sup>27</sup>

For that reason, mitigating the possible impacts that politically-oriented deepfakes can have on our elections has become a priority. Yet, techniques for detecting deepfakes have struggled to keep pace with the countervailing techniques to avoid detection, and any long-term technological solution remains elusive.<sup>28</sup> Creating a detection system that cannot be learned and subverted is difficult enough, but the time it takes to deploy systems to detect a deepfake precludes them from being effective on a large scale.<sup>29</sup> Therefore, we should expect deepfakes to remain a part of our lives going forward; the best we can hope for are new legislative solutions that ensure recourse for the victims when deepfakes are detected and assign blame when appropriate.

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<sup>25</sup> Mak & Temple-Raston, supra note 23.

<sup>26</sup> Deep Fakes and National Security, Cong. Rsch. Serv. (June 3, 2022).

<sup>27</sup> Mak & Temple-Raston, supra note 23.

<sup>28</sup> Cristian Vaccari & Andrew Chadwick, Deepfakes and Disinformation: Exploring the Impact of Synthetic Political Video on Deception, Uncertainty, and Trust in News, Sage (Mar. 2020). See also John A. Barrett Jr., Free Speech Has Gotten Very Expensive: Rethinking Political Speech Regulation in a Post-Truth World, 94 St. John's L. Rev. 615, 635. Even when deepfakes may be proven inaccurate, trying to discredit a post cannot always “outpace” the original post, and reporting on a deepfake might actually fuel the image’s dissemination. Harwell, supra note 5.

<sup>29</sup> Cf. Kate Larsen, Race to Defuse Deepfake Videos: UC Berkeley Researchers Creating Software for Newsrooms (Jul. 8, 2019); Vaccari & Chadwick, supra note 28.

Another reason it is important to have effective, workable legislation in place to assign liability to deepfake publishers is our inability to affect change upstream. Not only does Section 230 of the Communications Decency Act dictate that platforms cannot be held liable for what is posted on them,<sup>30</sup> there is now a possibility that internet companies may not be able to police their own platforms even of their own volition. In the recent case of NetChoice v. Paxton, a group of large internet and technology businesses challenged a Texas statute that prohibited them from removing posts from their platforms based on the viewpoint expressed or represented in the post.<sup>31</sup> The internet companies argued that they were entitled to engage in editorial discretion as to what remains on their platform, and thus must retain control over “whether, to what extent, and in what manner to disseminate third party-created content to the public.”<sup>32</sup> Though the companies viewed the ability to remove content that violates their stated values as their First Amendment right to speech, the Fifth Circuit reasoned that the companies’ behavior was more accurately described as a “right to censor” that is not entitled to First Amendment protection.<sup>33</sup> The Fifth Circuit’s holding raises questions about the future of content moderation and severely weakens internet companies’ -- chief amongst them, Meta and Tiktok -- ability to respond to hate speech.<sup>34</sup> Though deepfakes played no overt part in the Fifth Circuit’s opinion, the implications

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<sup>30</sup> 47 U.S.C. § 230, Communications Decency Act.

<sup>31</sup> NetChoice, LLC v. Paxton, 49 F.4th 439, 444 (5th Cir. 2022). The platforms remain able to remove content in certain circumstances, such as if it directly incites criminality.

<sup>32</sup> Id. at 490. This position was supported by, among other cases, the Eleventh Circuit’s recent holding in NetChoice v. Attorney General that a Florida law restricting platforms’ ability to engage in content moderation violated the platforms’ First Amendment rights. No. 21-12355 (11th Cir. 2022).

<sup>33</sup> Id. at 491, 494.

<sup>34</sup> Nithin Venkatraman, NetChoice, L.L.C. v. Paxton: 5th Circuit Sets Up Supreme Court Battle Over Content Moderation Authority of Social Media Giants, **Harv. J.L. & Tech. Jolt Digest** (2022).

of this holding will make it very difficult for social media platforms to combat deepfakes, even those with severe repercussions on our democratic system.

## B. Existing and Proposed Deepfake Laws

Several states have enacted bills targeting the dissemination of deepfakes relating to election interference.<sup>35</sup> Legislators in other states and the House of Representatives have proposed similar statutes, as well. Below are brief summaries of the key features of these statutes.

In defining what constitutes a deepfake, these statutes differ with respect to the type of media and the person depicted. California’s statute and New Jersey’s proposed statute define a deepfake as any audio or visual media -- either a technologically altered version of a real audiovisual or a technologically created audiovisual “substantially derivative” of a real audiovisual -- that appears to depict a candidate doing or saying something that they did not in reality do or say.<sup>36</sup> Texas’s statute defines deepfakes to include videos “created with artificial intelligence” to falsely depict a person doing something that they, in reality, did not.<sup>37</sup> The proposed House Bill’s definition encapsulates any audio-visual records, created without consent, that depict a living or dead person engaged in a “material activity” that they did not, in reality, engage in.<sup>38</sup> Illinois’s proposed statute identifies media as a deepfake if either a candidate is

<sup>35</sup> Although New York, Virginia, and Florida have passed laws targeting certain deepfakes, none of them currently have statutes specifically related to politically-oriented deepfakes. **N.Y. Penal Code** 240.78 (2021); **Va. Code Ann.** § 18.2-386.2 (2019); **Fla. Stat.** § 775.0847, amended by S.B. 1798 (2021).

<sup>36</sup> **Cal. Elec. Code** § 20010, amended by A.B. 730 (2019), A.B. 972 (2022); N.J. A. 4985 (2020). New Jersey’s bill, which would have amended N.J. Rev. Stat. § 19:34, has not passed to date. New Jersey Assembly Bill 4985 (Prior Session Legislation), **Legiscan**, <https://legiscan.com/NJ/bill/A4985/2020>.

<sup>37</sup> **Tex. Elec. Code** § 255.004, amended by S.B. No. 751 (2019).

<sup>38</sup> H.R. 2395 DEEP FAKES Accountability Act, 117<sup>th</sup> Congress (2021). This bill was introduced by Rep. Yvette Clark; a previous iteration was introduced by Rep. Clark in 2019. In October

digitally added to an image they were not in reality a part of, or if an image of a candidate is digitally altered to add another person.<sup>39</sup> Finally, Washington’s statute defines a deepfake as an image, video, or audio depicting an individual’s appearance, speech, or conduct that is intentionally manipulated with “generative adversarial network techniques” to create a false but realistic depiction.<sup>40</sup>

The standard for conduct subject to liability also varies from statute to statute. Under Washington’s statute, California’s statute, and New Jersey’s and Illinois’s proposed statutes, liability may attach if a reasonable viewer would believe the media to be authentic and if their “understanding or impression” of the audiovisual’s “expressive content” would be different than if they’d seen an unaltered audiovisual.<sup>41</sup> As for Texas’s statute, a video created with the “intent to influence” an election may be held liable.<sup>42</sup> The proposed House bill would attach liability if a reasonable viewer would believe the media to be accurate and the deepfake is “substantially likely” to improperly influence an election.<sup>43</sup>

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2021, the bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security, where it remains. H.R.2395 – DEEP FAKES Accountability Act, 117<sup>th</sup> Congress (2021-2022), <https://www.congress.gov/bill/117th-congress/house-bill/2395/text>. It is beyond the scope of this note to address this element in its entirety, but the House’s definition is the best-suited to adapt to dangerous deepfakes.

<sup>39</sup> **Ill. S.B. 3746** (2020). This bill, which would have amended **Ill. Elec. Code** § 5, never made it out of Committee and has not been renewed since the start of the 2021 term. Bill Status of SB3746 101<sup>st</sup> General Assembly, Illinois General Assembly, <https://www.ilga.gov/legislation/BillStatus.asp?GA=101&DocTypeID=SB&DocNum=3746&GAID=15&SessionID=108&LegID=125786>.

<sup>40</sup> **Wash. S-1130.1** (2023). This bill, effective July 2023, will amend Title 42 RCW.

<sup>41</sup> **N.J. A. 4985** (2020) (denoting exceptions for satirical and parodic media); **Cal. Elec. Code** § 20010; **Wash. S-1130.1** (2023); **Ill. S.B. 3746** (2020).

<sup>42</sup> **Tex. Elec. Code** § 255.004.

<sup>43</sup> **H.R. 2395** (2021). As expounded upon infra, none of these statutory elements are recommended.

New Jersey’s proposed statute and California’s statute limit liability to those that distribute a deepfake in the run-up to an election with the intent of influencing an election or harming a candidate’s reputation.<sup>44</sup> Texas’s statute limits liability to a person that creates a deepfake and “causes the [deepfake] to be published” in the run-up to an election.<sup>45</sup> Under the proposed House bill, criminal liability is limited to any person who produces a deepfake with “intent to distribute” for the purposes of influencing an election, and civil liability is limited to any person that knowingly removes or “meaningfully obscures” a disclaimer for the purposes of influencing an election, or anyone that produces a deepfake without the requisite intent for criminal liability.<sup>46</sup> Illinois’s proposed statute would limit liability to those that produce or publish a deepfake.<sup>47</sup>

Several of these statutes also incorporate disclaimer requirements to address concerns about the believability and resulting impact of deepfakes. To avoid liability, Washington’s statute and Illinois’s and New Jersey’s proposed statutes require that any visual deepfake must be accompanied by an unambiguous textual disclaimer for the duration of the deepfake; any audial deepfake must be accompanied by an unambiguous audial disclaimer at the beginning, end, and - - depending on the duration of the media -- throughout the deepfake.<sup>48</sup> California’s statute stipulates that one must include a “specified disclosure” to avoid liability.<sup>49</sup> To avoid liability with respect to the proposed House bill, any visual deepfake must be accompanied by an unambiguous textual disclaimer continuously present on the deepfake; any audial deepfake must

<sup>44</sup> N.J. A. 4985 (2020); **Cal. Elec. Code** § 20010.

<sup>45</sup> **Tex. Elec. Code** § 255.004.

<sup>46</sup> H.R. 2395 (2021). It is beyond the scope of this note to consider this element in its entirety, but the House bill would most effectively and constitutionally address different actors’ conduct.

<sup>47</sup> **Ill. S.B.** 3746 (2020).

<sup>48</sup> N.J. A. 4985 (2020); **Ill. S.B.** 3746 (2020); **Wash. S-1130.1** (2023).

<sup>49</sup> **Cal. Elec. Code** § 20010.

be accompanied by an unambiguous audial disclaimer, as well as an additional audial disclaimer if the deepfake exceeds two minutes; any deepfake containing both audio and video components must be accompanied by an audial disclaimer and an unambiguous textual disclaimer; any deepfake containing a “moving visual element” must be accompanied by an “embedded digital watermark” disclaimer.<sup>50</sup> Texas’s statute does not contain disclaimer provisions.<sup>51</sup>

Statutes also diverge on whether civil or criminal liability is prescribed. California’s and Washington’s statutes, as well as New Jersey’s proposed statute, assign civil liability for violators;<sup>52</sup> candidates that are the subject of a deepfake may seek damages under all three statutes, though only California’s allows for “any registered voter” to seek injunctive relief.<sup>53</sup> Texas’s statute and Illinois’s proposed statute incorporate criminal liability.<sup>54</sup> And as noted above, the proposed House bill contains both criminal and civil liability provisions, categorizing production of and intent to distribute a deepfake for the purposes of influencing an election as a criminal offense, whereas deepfake producers with lesser *mentes rea*e and culpable subsequent sharers fall under the civil offense;<sup>55</sup> the private right of action available under the proposed House Bill is limited to a person or entity that is falsely depicted by a deepfake.<sup>56</sup>

<sup>50</sup> H.R. 2395 (2021).

<sup>51</sup> **Tex. Elec. Code** § 255.004. As developed *infra*, any strict disclaimer requirement carries with it both constitutional and policy-based concerns.

<sup>52</sup> N.J. A. 4985 (2020); **Cal. Elec. Code** § 20010; **Wash.** S-1130.1 (2023).

<sup>53</sup> N.J. A. 4985 (2020); **Cal. Elec. Code** § 20010; **Wash.** S-1130.1 (2023). As any suit must still satisfy constitutional standing requirements, the plaintiff would still have to demonstrate an “injury in fact” that bears a causal connection to the deepfake and may be redressed by the requested relief. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

<sup>54</sup> **Tex. Elec. Code** § 255.004; **Ill.** S.B. 3746 (2020).

<sup>55</sup> H.R. 2395 (2021). There are benefits and drawbacks to both civil and criminal liability schemes, as described *infra*; it is beyond the scope of this note to make a recommendation for future legislation.

<sup>56</sup> *Id.*

Evidently, many similarities exist across current and proposed statutes targeting politically-oriented deepfakes. Common among these statutes are a patchwork system of binary tests, including: the presence or absence of the requisite form of disclaimer, if the individual was the original publisher or a subsequent sharer, if the deepfake portrays a candidate or another person, if the deepfake was or was not posted in the “run-up” to an election, and the presence or absence of the requisite mens rea. These rigid requirements raise constitutional concerns, and they are not readily adaptable to the types of threats detailed above. Part II highlights the problems with each of these tests -- especially in their interaction with each other.

## **II. Constitutional Obstacles and Policy Blind Spots of Current Deepfake Laws**

This part seeks to demonstrate the need for a new approach to regulating politically-oriented deepfakes. To begin, it examines common First Amendment concerns with policing deepfakes, particularly grounded in the recent, influential Supreme Court case of United States v. Alvarez. Then, it assesses the merits of current deepfake laws’ shared features.

### **A. Constitutional Footing of Deepfake Laws**

It is no secret that any limitation on First Amendment free speech protections will face stark opposition. Hesitance to “chill” protected speech is particularly heightened for politically-oriented statements and opinions,<sup>57</sup> even those that are decidedly false.<sup>58</sup> One such example is the recent case of United States v. Alvarez, in which the Supreme Court found unconstitutional a statute that criminalized falsely claiming to have been awarded the Congressional Medal of

<sup>57</sup> See Snyder v. Phelps, 562 U.S. 443, 452 (2011) (noting that “speech on public issues . . . is entitled to special protection” and describing public issues as “any matter of political, social, or other concern to the community”) (internal citations omitted).

<sup>58</sup> See Rickert v. State of Washington, Public Disclosure Comm’n, 168 P.3d 826 (2007) (finding that a political candidate could not be held liable for even false statements about her competitor).